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In the Supreme Court of the United States

OCTOBER TERM, 1994

PHILLIPS PETROLEUM COMPANY, PETITIONER

v.

GARY JOHNSON, AREA MANAGER, DALLAS AREA COMPLIANCE OFFICE, MINERALS MANAGEMENT SERVICE, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

WILLIAM G. PAUL
KENNETH E. ROGERS
Office of the General Counsel
Phillips Petroleum Company
1260 Adams Building
Bartlesville, OK 74004

ARTHUR M. (RUSS) MEYER, JR.
T.L. (TOM) CUBBAGE II
Brown McCarroll &
Oaks Hartline
300 Crescent Court
Dallas, TX 75201-6929

ANDREW L. FREY
Counsel of Record
KENNETH S. GELLER
DONALD M. FALK
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0602

Counsel for Petitioner

QUESTION PRESENTED

Whether 28 U.S.C. § 2415(a), which imposes a six-year statute of limitations upon "any action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract," applies to a claim asserted by the federal government for royalties under a mineral lease.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

In addition to the parties appearing in the caption of the case, the following were parties to the proceeding below:

Atlantic Richfield Company
United States Department of the Interior
United States Minerals Management Service
Nick L. Kelly, Area Manager, Dallas Area Compliance Office, Minerals Management Service, United States Department of the Interior
Barry Williamson, Director, Minerals Management Service, United States Department of the Interior
Manuel Lujan, Jr., Secretary of the Interior

The individual defendants were named only in their official capacities.

Phillips Petroleum Company has no parent company, and has the following non-wholly owned subsidiaries:

Alyeska Pipeline Service Company
Arctic LNG Transportation Company
Bissendorf Biosciences GmbH
Canyon Reef Carriers, Inc.
Chisholm Pipeline Company
Colonial Pipeline Company
Cristal Ltd.
Dixie Pipeline Company
Eagle Sun Company Ltd.
East Texas Salt Water Disposal Company
Explorer Pipeline Company
FLTG Inc.
Heat Transfer Research, Inc.
Kenai LNG Corporation
Multinational Gas and Petrochemical Services Ltd.
Norland GmbH für Grundbesitz und Industrieanlagen
Norpipe A.S.

Norpipe Petroleum UK Ltd.
Norsea Gas A/S
Norsea Gas GmbH
Norsea Pipeline Ltd.
Oil Casualty Insurance Ltd.
Oil Insurance Ltd.
Phillips-Imperial Petroleum Ltd.
Phillips Gas Company
Phillips Morrison Resources Ltd.
Phillips P.C. Resources Ltd.
Phillips Petroleum Singapore Chemicals (Private) Ltd.
Phillips Sumika Polypropylene Company (Partnership)
Phillips-San Juan Partners, L.P.
Piro Implementation, Inc.
Polar LNG Shipping Corporation
Prince William Sound Oil Spill Response Corporation
Renolit-Haus AG
Renolit-Haus GmbH
Southern and Phillips Gas Limited
Sweeny Olefins Limited Partnership
Venezoil, C.A.
Western Desert Operating Petroleum Company
(WEPCO)

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PETITION FOR A WRIT OF CERTIORARI

Phillips Petroleum Company respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The supplemental opinion of the court of appeals on rehearing (App., *infra*, 1a-4a) is not reported. The prior opinion of the court of appeals (App., *infra*, 5a-14a) is reported at 22 F.3d 616. The opinions of the district court (App., *infra*, 15a-78a) and the orders of the Minerals Management Service (App., *infra*, 79a-100a) are unreported.

JURISDICTION

The court of appeals entered its initial judgment on June 10, 1994. See App., *infra*, 5a-14a. Thereafter, the court of appeals granted rehearing, entering a modified judgment on September 7, 1994. See App., *infra*, 1a-4a. A timely petition for rehearing was denied on November 1, 1994. See App., *infra*, 101a-103a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 2415(a) provides in pertinent part:

> Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later * * * .

STATEMENT

This case presents the question whether the United States has an unlimited time to collect past-due royalties on federal mineral leases. There is no specific federal statute of limitations for the collection of lease royalties. There *is*, however, a general six-year limitation on contract actions brought by the United States. 28 U.S.C. § 2415(a). A mineral lease is a contract, and the obligation to pay royalties is a covenant under that contract.

The Fifth Circuit held, nonetheless, that Section 2415(a) does *not* apply to the collection of royalties due under lease contracts. That conclusion relied upon the practice followed

by the Minerals Management Service ("MMS") of the Department of the Interior in collecting past-due, unpaid or underpaid mineral lease royalties. After identifying a suspected underpayment, the MMS issues an administrative order to pay the royalties. If the lessee does not pay, the MMS files an action in district court seeking enforcement of its order. Often, as in this case, the enforcement action is a counterclaim to the lessee's complaint seeking judicial review of the order to pay.

According to the Fifth Circuit, in this chain of events the United States never files an "action for money damages" that could be barred by Section 2415(a). As a consequence, the government can assess unpaid royalties that became due in the distant past and then, without any time limitation whatsoever, demand and enforce payment from lessees.

The Tenth Circuit disagrees with this surprising result; within the jurisdiction of that court, a lessee's liability for royalties is not perpetual. On the contrary, the running of the limitations period may be a "defense to payment" sought by the MMS in administrative proceedings or subsequent litigation. *Mesa Operating Limited Partnership* v. *Lujan*, 17 F.3d 1288, 1291 (10th Cir. 1994). In that circuit, the MMS's right to collect past royalties expires six years after the agency knew or reasonably should have known of an underpayment. *Phillips Petroleum Co.* v. *Lujan*, 4 F.3d 858 (1993). See 28 U.S.C. § 2416(c). Outside the mineral leasing context, other circuits have given Section 2415(a) a more flexible, common-sense scope than the Fifth Circuit did here. And the District of Columbia Circuit has rejected an argument that would have allowed the government to avoid a different but analogous statute of limitations by using administrative instead of judicial procedures in the first instance. *3M Co.* v. *Browner*, 17 F.3d 1453 (1994).

The question presented by this case is of critical importance to United States energy producers. Without the pro-

tection of a statute of limitations, their accounts are open forever, and they are forever vulnerable to government demands to pay stale contractual obligations. This Court should grant certiorari to resolve the conflict among the circuits and to ensure that the United States may not evade the general statute of limitations for contract actions by administrative sleight-of-hand.

A. The Federal Mineral Leasing Program

The federal government has leased certain mineral rights on the public lands since the enactment of the Mineral Leasing Act of 1920, 30 U.S.C. §§ 181-287. More than 1½ billion acres of federal and Indian lands and the Outer Continental Shelf ("OCS") come within the federal mineral leasing jurisdiction; approximately 100 million acres are actually leased, one-third of which are offshore.[1] See 1 ROCKY MOUNTAIN MINERAL LAW FOUNDATION, LAW OF FEDERAL OIL & GAS LEASES § 1.01, at 1-1 to 1-2 (1992).

Although dozens of kinds of minerals are subject to leases, oil and gas leases make up the vast majority both of leases and of royalties paid; coal leases account for most of the remaining royalties. U.S. DEPARTMENT OF THE INTERIOR, MINERALS MANAGEMENT SERVICE, MINERAL REVENUES 1993: REPORT ON RECEIPTS FROM FEDERAL AND INDIAN LEASES 11, 95 (1994) ("MINERAL REVENUES 1993"). Federal lessees produce a significant proportion of United States domestic energy production: one-third of the natural gas, 30% of the coal, and 20% of the oil. *Id.* at 25.

Federal mineral lessees pay a royalty expressed as a percentage of the value of the minerals extracted. Federal mineral leases generally give the Secretary of the Interior the

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[1] For simplicity, we refer to all leases supervised by the Department of the Interior as "federal leases" whether the leases are on federal lands, Indian lands, or the Outer Continental Shelf.

right to set a minimum value of production against which the royalty shall be computed. The leases also incorporate by reference the relevant statutes and regulations, including those promulgated while the lease is in effect.[2] The regulations confirm the Secretary's right to set the value of gas produced on a federal lease. See 30 C.F.R. § 206.153 (1994).

The MMS is responsible for collecting lease royalties. Lessees must report their gas production and pay royalties every month.[3] 30 C.F.R. §§ 206, 216-218 (1994). The MMS may audit royalty reports and determine whether additional royalties should have been paid. *Id.* §§ 206, 217. Although the Federal Oil and Gas Royalty Management Act ("FOGRMA") requires lessees to retain records for only six years after generating them, the MMS may extend the record retention period by beginning an audit or investigation involving particular records. 30 U.S.C. § 1713(b).

The MMS often uses the following procedure to assess and collect allegedly underpaid royalties: After the agency has identified a possible underpayment through an audit or other review, the MMS area compliance officer notifies the lessee of a preliminary determination of liability and invites the lessee to submit further information if it believes that the determination is in error. After considering any response,

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[2] In addition to the Mineral Leasing Act, the principal statutes governing federal mineral leasing are the Mineral Leasing Act for Acquired Lands, 30 U.S.C. §§ 351-359, two acts providing for the leasing of Indian lands, 25 U.S.C. §§ 396-396g, the Outer Continental Shelf Lands Act of 1953, 43 U.S.C. §§ 1331-1356, and the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. §§ 1701-1757. The last two are most pertinent to this case.

[3] Because only gas leases are at issue in this case, we refer only to gas production. Similar principles govern leases for other minerals.

the MMS area compliance officer issues a final liability determination and order to pay.

At that point, the lessee is entitled to appeal the determination through the Interior Department. See 30 C.F.R. §§ 243, 290 (1994). Because the payment order is not automatically stayed pending administrative appeal, however, the compliance officer's order is final and may be judicially reviewed under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, without the exhaustion of administrative appellate remedies. See App., *infra*, 36a n.6.

The MMS payment order, though final agency action, is not self-executing but stands only as a determination of the underlying obligation along with a demand for payment. See, *e.g.*, *Arch Mineral Corp.* v. *Lujan*, 911 F.2d 408, 411 (10th Cir. 1990); *Mobil Exploration & Producing U.S., Inc.*, 119 I.B.L.A. 76, 81 (1991). In order to collect the amount due from the lessee, the MMS must seek enforcement of its order from a federal district court. See 30 U.S.C. § 1722. The MMS also can impose civil penalties for the failure to correct a violation such as the underpayment of royalties. See *id.* § 1719. Civil penalties are governed by a separate statute of limitations in the FOGRMA: any action to recover penalties must be brought within six years "after the date of the act or omission which is the basis for the action." *Id.* § 1755.

B. Proceedings Below

1. In 1989, the MMS Dallas Area Compliance Office issued three orders demanding that Phillips Petroleum Company recalculate and pay additional royalties on three groups of offshore leases. App., *infra*, 79a-91a, 96a-100a. The first two orders, dated June 5 and September 26, recounted the results of "sample audits" that, the MMS claimed, indicated that Phillips had failed to pay royalties on reimbursements received for production-related costs. App., *infra*, 86a-91a, 96a-100a ("Production Reimbursement

Orders"). Although the MMS permanently maintains four auditors at Phillips' headquarters, App., *infra*, 49a, the orders required Phillips itself to review its royalty calculations beginning July 25, 1980, for all leases acquired in two mergers, and to pay any additional royalties due on the relevant reimbursements within 30 days of each order. *Id.* at 88a, 98a. The third order, issued September 27, 1989, stated that Phillips had undervalued natural gas liquid products that were used internally without being sold, and required Phillips to recalculate and pay royalties on all of its offshore leases from January 1977 through February 1988. *Id.* at 35a, 79a-85a ("NGLP Order").[4]

Phillips did not appeal the MMS orders within the Department of the Interior, but instead filed lawsuits in the United States District Court for the Northern District of Texas in July, September, and October 1989. The jurisdiction of the district court was founded on 28 U.S.C. §§ 1331 and 1346. Each action sought a declaratory judgment that the pertinent order was invalid and an injunction against the enforcement of that order.[5] Phillips' three actions were consolidated with a similar action filed by the Atlantic Richfield Company. App., *infra*, 35a.

Both Phillips and the government moved for summary judgment. In an order dated September 18, 1992, the district court held that the MMS had the authority to order Phillips to recalculate past royalties and that the valuation method required in the NGLP Order was valid. App., *infra*, 32a-78a. The court granted partial summary judgment to Phillips, however, declaring that the statute of limitations

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[4] An order issued June 12, 1989, imposed late payment penalties on Phillips for certain 1982-1984 royalty underpayments that Phillips had remitted earlier in 1989. App., *infra*, 92a-95a.

[5] The parties agreed that the MMS orders were final for the purpose of judicial review. App., *infra*, 36a n.6.

contained in 28 U.S.C. § 2415(a) "bars the Government from bringing any causes of action * * * based on royalty payments on the leases at issue here that are due and owing for more than six years." App., *infra*, 52a.

Several weeks earlier, while the summary judgment motions were pending, the government had moved to amend its answer to add "omitted counterclaims" for the enforcement of the MMS orders. The district court granted that motion shortly after deciding the initial summary judgment motions. App., *infra*, 30a-31a.

The government then moved for summary judgment on its counterclaims for enforcement of the payment orders. Despite its earlier ruling, the district court held that these claims were not barred by Section 2415(a). App., *infra*, 18a-20a. The court thereupon ordered Phillips to "recompute and pay any unpaid royalties" in compliance with the MMS orders. *Id.* at 15a-17a.

2. The Fifth Circuit reversed in part. In its initial opinion, the court held that the production valuation method used in the NGLP Order violated the Administrative Procedure Act. App., *infra*, 5a-14a. The court acknowledged but did not dispose of Phillips' argument that Section 2415(a) barred the enforcement of the MMS orders. *Id.* at 6a.

Both Phillips and the government petitioned for rehearing, noting that the Production Reimbursement Orders did not involve the rejected valuation procedure. On rehearing, the court of appeals affirmed the remainder of the district court's order, holding that Section 2415(a) did not apply to the MMS's collection of disputed royalties in this case.[6] App., *infra*, 1a-4a.

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[6] The court of appeals again failed to decide whether the MMS had the authority to force Phillips to audit itself to determine whether it owed additional royalties.

The court of appeals began by holding that the government's effort to obtain enforcement of its asserted rights to additional payments under the lease did not involve the filing of a "complaint" and therefore was not subject to the strictures of Section 2415(a). App., *infra*, 3a. According no independent significance to the government's counterclaim, the court stated that the action before it was a "suit * * * for declaratory judgment brought by Phillips and ARCO." *Id.* at 3a n.1. "[M]oreover," the court added, "the agency order cannot be construed as a complaint." *Ibid.*

The court of appeals also held that an action seeking "monies due under a contract with the government" was not an "action for money damages." App., *infra*, 3a-4a. The court reasoned that "money damages" referred only to "a sum of money used as compensatory relief" and that the "contractual obligations" to pay royalties "cannot be considered compensatory." *Id.* at 4a.

REASONS FOR GRANTING THE PETITION

Statutes of limitations are "fundamental to a well-ordered judicial system." *Board of Regents* v. *Tomanio*, 446 U.S. 478, 487 (1980). Accordingly, Congress enacted 28 U.S.C. § 2415(a) in order to "equalize[ ] the litigative opportunities between the Government and private parties." *Crown Coat Front Co.* v. *United States*, 386 U.S. 503, 521 (1967). Section 2415(a) covers "Government litigation [that] arises out of activity which is very similar to commercial activity"; "fairness and equity" require "that the law should provide a period of time within which the Government must bring suit on claims," as it does for the claims of private individuals. S. Rep. No. 1328, 89th Cong., 2d Sess., reprinted in 1966 U.S.C.C.A.N. 2502, 2503; H.R. Rep. No. 1534, 89th Cong., 2d Sess. 4 (1966).

The Fifth Circuit's narrow and grudging reading of Section 2415(a) deprives federal mineral lessees of the repose afforded others who contract with the United States. In the

Fifth Circuit—the circuit where most federal oil and gas resources lie—the government's remedies for breach of the covenant to pay royalties have no time limit at all. By giving more weight to procedural form than to the "strong policies of repose" (*Tomanio*, 446 U.S. at 487) that undergird the general statute of limitations for contract actions, the Fifth Circuit has placed American energy producers eternally at the mercy of MMS auditors and bureaucrats.

This Court should not let this state of affairs stand without review, especially as has it resulted in a conflict between the two circuits whose decisions are most important in the area of mineral leasing. The Tenth Circuit adheres to the contrary view that Section 2415(a) does in fact apply to MMS royalty collection efforts. Phillips thus is vulnerable to an action to enforce an order to pay stale royalties if that action (or counterclaim) is brought in the district where Phillips' OCS leases are located, but not if the action is brought where Phillips itself is located. The Fifth Circuit's stilted reading of Section 2415(a) also conflicts with common-sense interpretations of other circuits that have been more mindful of Congress's intent to level the playing field between the government and private litigants.

Moreover, the Fifth Circuit's decision is of paramount importance to the energy industry in the United States. Federal leases account for between 20 and 33 percent of domestic fossil fuels. The MMS's production valuation regulations are undeniably complex, as are the agency's interpretations. To give the MMS *carte blanche* to collect additional royalties years after the fact injects unnecessary uncertainty into an already volatile industry.

Mineral leases clearly come within the universe of contracts covered by Section 2415(a), and a reasonable interpretation of the statute requires its application to the royalty collection efforts at issue here. This Court should grant review to settle this important question.

A. The Decision of the Fifth Circuit Conflicts With Decisions of Other Circuits That Have Considered Section 2415(a)

1. The decision below creates a conflict between the two most important circuits for the administration of federal mineral leases. At present, the United States is subject to Section 2415(a) when it attempts to collect past royalties in the Tenth Circuit but not when it attempts to do the same thing in the Fifth Circuit. Phillips and other lessees are eternally at peril of lawsuits seeking past royalties for their leases in (and offshore from) Texas or Louisiana, but their liability for royalties due on leases in Oklahoma or Colorado is limited in time. This Court should resolve that conflict and impose a uniform rule of limitation.

At the outset, we note that the Fifth Circuit's failure to publish the decision below in no way diminishes the conflict with the Tenth Circuit. Unpublished decisions are binding on subsequent Fifth Circuit panels. *E.g.*, *Hodges* v. *Delta Airlines*, 4 F.3d 350, 355 (5th Cir. 1993), rehearing en banc granted, 12 F.3d 426 (1994); *United States* v. *Don B. Hart Equity Pure Trust*, 818 F.2d 1246, 1250 (5th Cir. 1987); 5th Cir. R. 47.5.3. There is no possibility that the government, which necessarily is a party to all royalty litigation, would be unaware of the decision. Accordingly, because the Fifth Circuit will continue to follow the decision below, there is no sound reason for this Court to await further action by the Fifth Circuit before considering this important issue.

In direct contradiction to the Fifth Circuit, the Tenth Circuit has taken the view that, because "oil and gas leases are contracts," Section "2415(a) is the controlling statute of limitations" applicable to MMS efforts to collect unpaid royalties. *Phillips Petroleum Co.* v. *Lujan*, 4 F.3d 858, 860 & n.1 (10th Cir. 1993). Proceeding from that holding, the Tenth Circuit decided that the cause of action accrued under Section 2415(a) when the royalties became due, and that a

fact-specific inquiry governed the extent to which the limitations period may have been tolled by Section 2416(c) (under which the period does not run while "facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances"). See 4 F.3d at 860-864.

The Tenth Circuit recently reaffirmed that "the statute of limitations commences to run in an action by the government to recover unpaid royalties from oil and gas leases when the government knew or should have known about the deficiency." *Mesa Operating Limited Partnership* v. *Department of Interior*, 17 F.3d 1288, 1291 (10th Cir. 1994). Although the lessee in *Mesa* was held to have waived the defense, "the statute of limitations would have been a defense to payment" had it not been waived. *Ibid.*

The conflict between the Tenth and Fifth Circuits on the application of Section 2415(a) to the federal scheme for collecting past-due royalties is especially significant in light of the disproportionate concentration of federally leased mineral production within those two circuits. Offshore oil and gas royalties account for more than three-quarters of all oil and gas royalties, MINERAL REVENUES 1993, *supra*, at 30, and more than 95% of OCS oil and gas royalties come from offshore Louisiana and Texas, both of which lie within the Fifth Circuit. *Id.* at 31. The Tenth Circuit is equally dominant with respect to *on*shore production. Leases in that circuit produced 92% of the gas, 72% of the oil, and 88% of the coal produced in onshore federal leases. *Id.* at 67.[7]

2. The decision of the Fifth Circuit also conflicts with the decisions of other circuits interpreting federal statutes of limitations. The principal points of dispute are the applica-

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[7] Most Alaskan leases have been transferred to Alaska Natives and are not managed by the MMS. See MINERAL REVENUES 1993, *supra*, at 47.

tion of Section 2415(a) to actions that are not garden-variety contract damages suits, and the application of statutes of limitations where the government proceeds initially by issuing an administrative order. This case offers this Court an opportunity to clarify the law in these important areas.

The Fifth Circuit offered two reasons why an action to enforce an administrative order to comply with a contractual royalty obligation by paying money is not an "action for money damages" within the terms of Section 2415(a). First, the government had not filed a "complaint" when it sought judicial aid to enforce its order; second, the sum of money that the government sought from Phillips was not "compensatory" and thus was not "damages." App., *infra*, 3a-4a.

Other courts of appeals have given a broader reading to the term "action for money damages" in Section 2415(a). For example, the Fifth Circuit's apparent view that a counterclaim cannot be a "complaint," and thus that its litigation is not an "action" under Section 2415(a), conflicts with a recent decision of the Ninth Circuit, *United States* v. *Toro*, 981 F.2d 1045, 1047 (9th Cir. 1992). In *Toro*, the court held that the government's motion to forfeit a bail bond was subject to the six-year limitation in Section 2415(a), even though the government's claim was asserted by motion within a pre-existing criminal action rather than in an independent lawsuit. Under the Ninth Circuit's reasoning, a complaint or counterclaim for an injunction enforcing an administrative payment order clearly is an "action" that is covered by the statute of limitations.

Moreover, courts regularly have found that government "claims to enforce notes, guaranties, or other contracts" to pay money are limited by Section 2415(a). *FDIC* v. *Bachman*, 894 F.2d 1233, 1237 (10th Cir. 1990). Section 2415(a) has been applied to bar actions seeking to recover deficiencies on promissory notes, although the related

equitable actions to foreclose mortgages were not barred. *United States* v. *Alvarado*, 5 F.3d 1425, 1428, 1430 (11th Cir. 1993); *United States* v. *Dos Cabezas Corp.*, 995 F.2d 1486, 1489-1490 (9th Cir. 1993). Under the logic of these cases, an action to collect a debt that is founded on a contract is not outside the scope of "action[s] for money damages" under Section 2415(a) simply because the action alternatively could be characterized as a request for specific performance of a contractual obligation to pay money. See *Dos Cabezas*, 995 F.2d at 1490. See also *United States* v. *Vanornum*, 912 F.2d 1023, 1025 (8th Cir. 1990) (applying § 2415(a) to an action to enforce loan guarantees); *United States* v. *Rollinson*, 866 F.2d 1463, 1465 (D.C. Cir.) (same), cert. denied, 493 U.S. 818 (1989); *United States* v. *Moore*, 968 F.2d 1099, 1101 (11th Cir. 1992) (an action to set aside a fraudulent conveyance is an action in quasi-contract and thus is covered by § 2415(a)). That logic—that the application of Section 2415(a) depends on the substance of a claim rather than its form—plainly encompasses an action to recover an oil or gas royalty.

The Fifth Circuit also held that "[a]gency orders are * * * not barred by the limitations period of § 2415." App., *infra*, 4a. That holding is in tension with the decision of the District of Columbia Circuit in *3M Co.* v. *Browner*, 17 F.3d 1453 (1994). That court held in *3M* that the five-year statute of limitations for any "action, suit or proceeding" to enforce a civil penalty (28 U.S.C. § 2462) applied to "civil penalty cases brought before agencies." 17 F.3d at 1455-1456. The court rejected the argument that only *judicial* actions, suits or proceedings could be barred as untimely: "Given the reasons why we have statutes of limitations, there is no discernible rationale for applying" a limitation when "an action or proceeding is brought in court, but not when it is brought in an administrative agency." *Id.* at 1457. Under the reasoning of the *3M* court, an MMS payment order—"the very act that initiates the actions leading to the collection" of

the royalty—would be barred directly if it was untimely under Section 2415(a). *Id.* at 1459 (quoting *Mullikin* v. *United States*, 952 F.2d 920, 933 n.1 (6th Cir. 1991) (Boggs, J., concurring in part and dissenting in part), cert. denied, 113 S. Ct. 85 (1992)).

The conflict among the circuits invites rampant forum-shopping by the government and lessees alike. Because a suit to enforce an MMS payment order may be brought where either the lease or the lessee is located (see 28 U.S.C. § 1391(b), (c)), the government will carefully choose its venue. A lessee initiating judicial review will do the same: Phillips had the option of bringing this action in the Fifth Circuit (where the leases are), the Tenth Circuit (where the alleged errors in royalty calculation occurred), or the District of Columbia Circuit (where the MMS and the Department are located). 28 U.S.C. § 1391(e). A lessee's liability for stale royalty obligations should not hinge on the location of the courthouse.

B. The Application of the Statute of Limitations to Federal Royalty Collections Is a Question of Exceptional and Recurring Importance

Even if there were no conflict in the circuits, the erroneous decision of the Fifth Circuit would be exceptionally important because of its surprising breadth—effectively removing all time limitations from government claims for recovery of lease royalties—and because most leased oil and gas production takes place within the territorial jurisdiction of that court. As noted above (at p. 12, *supra*), leases within the Fifth Circuit account for approximately three-quarters of all oil and gas royalties.

The MMS royalty management program is enormous. The MMS recovered $190 million in royalty underpayments in 1993. MINERAL REVENUES 1993, *supra*, at xi, 2. A single action to collect underpaid royalties may result in a million-dollar liability. *E.g.*, *Mesa*, 17 F.3d at 1290 n.1.

And one issue on the horizon—settlements of take-or-pay agreements made in the early 1980s—will require the MMS to evaluate the royalty status of $14 billion in revenues. MINERAL REVENUES 1993, *supra*, at xi, 1-2.

The decision below directly affects the holders of the 25,000 producing and producible federal leases by depriving them of the "settled expectations" that stale royalty claims "will be barred." *Tomanio*, 446 U.S. at 487. These lessees paid nearly $48 billion in royalties in the ten years ending 1993 (MINERAL REVENUES 1993, *supra*, at 13, 96) and account for nearly one-third of the domestic energy supply (see p. 4, *supra*), as well as significant proportions of other minerals. *Id.* at 24. Federal lessees now are at the mercy of the MMS's dilatory audit and collection procedure literally forever.

The question whether Section 2415(a) limits the MMS's ability to collect old royalties is recurring as well as important. Because the MMS increasingly orders lessees to pay royalties that were more than six years overdue, the limitations issue has arisen again and again in litigation before the district courts and the Interior Board of Land Appeals. See, *e.g.*, *Atlantic Richfield Co.* v. *Lujan*, 811 F. Supp. 1520 (N.D. Okla. 1992); *Anadarko Petroleum Corp.* v. *Babbitt*, No. 3:92-CV-885-X (N.D. Tex. Sept. 23, 1993) (reviewing *Anadarko Petroleum Corp.*, 122 I.B.L.A. 141 (1992)); *Enron Oil & Gas Co.* v. *Babbitt*, No. CV93-0980 (W.D. La.); *Amoco Production Co.* v. *Lujan*, Civil No. 92-3381 (E.D. La.); *Phillips Petroleum Co.* v. *Johnson*, No. 3:91-CV-1610-H (N.D. Tex.); *Phillips Petroleum Co.* v. *Kelly*, No. 3:89-CV-2670-H (N.D. Tex.); *Conoco, Inc.* v. *Lujan*, No. 3:89-CV-2551-G (N.D. Tex.); *Arco Oil & Gas Co.*, 131 I.B.L.A. 299 (1994); *Chevron U.S.A., Inc.*, 129 I.B.L.A. 151 (1994); *Texaco, Inc.*, 129 I.B.L.A. 46 (1994); *Marathon Oil Co.*, 128 I.B.L.A. 168 (1994); *BHP Petroleum (Americas) Inc.*, 124 I.B.L.A. 185 (1992); *Benson-Montin-Greer Drilling Corp.*, 123 I.B.L.A. 341 (1992) (1989 order seeking

compensatory royalties for 1971-1977); *Marathon Oil Co.*, 119 I.B.L.A. 345 (1991); *Mobil Exploration & Producing U.S., Inc.*, 119 I.B.L.A. 76 (1991); *Amoco Production Co.*, 114 I.B.L.A. 42 (1990); *Forest Oil Corp.*, 111 I.B.L.A. 284 (1989); *Foote Mineral Co.*, 34 I.B.L.A. 285, 85 Interior Dec. 171 (1978), rev'd on other grounds, 654 F.2d 81 (Ct. Cl. 1981).

Moreover, this case presents a question of still broader significance—whether the term "action for money damages" in Section 2415(a) contains an enormous loophole for a variety of actions filed by government agencies to obtain money judgments founded upon contracts. The Interior Board of Land Appeals has held consistently that Section 2415(a) does not apply to administrative payment orders issued by the MMS or other agencies in the Interior Department. *E.g.*, *Arco Oil & Gas Co.*, 131 I.B.L.A. at 304 (mineral royalty); *Quality Broadcasting Corp.*, 126 I.B.L.A. 174, 188 (1993) (communication site rental). Under that reasoning, combined with the holding below, any agency, in the Interior Department or elsewhere, can avoid the limitations period of Section 2415(a) simply by adjudicating contract disputes administratively and then suing to enforce an administrative order to pay. No time limit will ever apply at either stage of the proceeding. If exploited, that result could affect all persons doing business with the government. It certainly does not comport with the "reasons why we have statutes of limitations." *3M*, 17 F.3d at 1457. Because the limitations issue presented in this case not only affects the "massive economic endeavor" of federal oil and gas leasing, LAW OF FEDERAL OIL & GAS LEASES, *supra*, §1.01, at 1-3, but strikes more deeply at the system of enforcing contractual claims made by the government against private parties, the case warrants review by this Court.

C. The Fifth Circuit's Ruling That the United States May Collect Lease Royalties Without Any Limitation in Time Is Erroneous

The Fifth Circuit's resolution of the issue in this case cannot be justified. It gives the United States something that Section 2415(a) expressly denies—a limitless time to assert contract claims against private parties who enter into agreements with the government. The scant reasoning of the court of appeals cannot justify eviscerating Section 2415(a) as it applies to mineral leases or other contractual obligations that may be construed by an administrative agency in the first instance but that depend on the courts for ultimate adjudication and enforcement.

Section 2415(a) may apply to royalty collection efforts in either of two ways.[8] First, it may apply only to the government's judicial actions to enforce administrative payment orders (as well as to any traditional actions for breach of a royalty agreement that the government might bring). Under that view, which Phillips believes is the better one, the six-year period runs until the government files a complaint or a counterclaim in a district court. Alternatively, Section

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[8] Two issues not squarely presented in this case merit brief discussion. The government has contended that its cause of action for breach of the covenant to pay royalties does not *arise* until the MMS completes an audit and issues a demand. That contention is plainly wrong. As in contract cases generally, the cause of action accrues at the time of the breach. *Unexcelled Chemical Corp.* v. *United States*, 345 U.S. 59, 65 (1953); *Phillips* v. *Lujan*, 4 F.3d at 861. The government also has argued that the limitations period must be tolled under Section 2416(c) until the end of an audit. Tolling continues only while "facts material to the right of action are not known *and reasonably could not be known*" by the responsible official. 28 U.S.C. § 2416(c) (emphasis added). Once the government has a lessee's royalty payments and production reports, the generous six-year limitations period begins to run and, barring fraud or obstruction by the lessee, *includes* the time the government needs to complete its investigation of a possible claim.

2415(a) may apply directly to the MMS's administrative payment orders, on the theory that they serve the same function as complaints in royalty disputes between private parties, *i.e.*, providing notice of a formal demand for contract damages that may be enforced by resort to governmental power.

Whether the judicial claim or the administrative order stops the running of the limitations period, Section 2415(a) must apply to limit the government's recovery of stale royalties in some way. Procedural improvisations cannot override the general limitation imposed by Congress on contract actions.

1. *Section 2415(a) Applies to Any Judicial Action to Require a Lessee to Pay Royalties Claimed to be Due on a Mineral Lease*

To come within the terms of Section 2415(a), a proceeding must be an "action for money damages * * * which is founded upon any contract express or implied in law." That definition encompasses the typical MMS action to enforce an administrative order to pay past-due royalties.

a. When a separate claim is asserted in a judicial proceeding, even by motion, that assertion begins an "action" under Section 2415(a). See *Toro*, 981 F.2d at 1047. Either a complaint or a counterclaim for an injunction enforcing a payment order clearly is such an "action."

The statutory language of Section 2415(a) compels the conclusion that an action to enforce an administrative decision may be subject to the limitations period. The statute quite plainly contemplates that in some instances "administrative proceedings" would precede the filing of an "action for money damages"; thus, when such "proceedings" are "required by contract or by law," Section 2415(a) extends

the limitations period for one year after they are concluded.[9] Yet the ensuing court "action" undeniably is covered by Section 2415(a), even though the action may be in essence judicial review of the administrative body's decision rather than a *de novo* legal action.[10]

The Fifth Circuit's contrary view reduces to absurdity the statutory provision for "required administrative proceedings." *Mandatory* administrative proceedings extend the statute of limitations at most a year beyond their conclusion; if the government does not file a judicial proceeding to enforce the administrative determination within that time, the contract rights become unenforceable. According to the Fifth Circuit,

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[9] The extension of the limitations period for "one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law" does not apply to the MMS enforcement actions at issue in this case. No statute, regulation, or provision of the lease *requires* the government to issue an administrative payment order before suing in court. The government has sometimes brought contract lawsuits against lessees who breached covenants to pay money. *E.g.*, *United States* v. *Essley*, 284 F.2d 518 (10th Cir. 1960). Indeed, the FOGRMA explicitly authorizes a *State*—regardless of any MMS administrative action—to "commence a civil action * * * against any person to recover any royalty * * * which the State believes is due * * * with respect to any oil and gas lease on Federal lands located within the State." 30 U.S.C. § 1734(a). It is plainly "apparent that the United States * * * could have brought suit without first resorting to administrative remedies." *Crown Coat Front Co.*, 386 U.S. at 519.

[10] This clearly is the case when the United States sues to enforce a contract that is subject to a typical disputes clause. See 41 U.S.C. § 605(a) (Contract Disputes Act of 1978); *Crown Coat Front Co.*, 386 U.S. at 505-506 (describing "standard disputes clause"); H.R. Rep. No. 1534, *supra*, at 4 (one-year extension applies to disputes clause proceedings); S. Rep. No. 1328, *supra*, 1966 U.S.C.C.A.N. at 2504. In that situation, contractual disputes must be submitted to an agency board of contract appeals; a court gives the board decision deferential review like that given an agency decision under the Administrative Procedure Act. Compare 41 U.S.C. §§ 321-322, 609(b) with 5 U.S.C. § 706.

however, a *purely optional* administrative process like the one that MMS pursues can eradicate the statute of limitations altogether. That cannot be right.[11]

As for the other terms of Section 2415(a), there can be little dispute that the obligation to pay royalties is "founded upon a contract," *i.e.*, the lease. The royalty clause creates an "obligation of the lessee * * * to pay money in an amount which is capable of being ascertained." 3 E. KUNTZ, LAW OF OIL & GAS § 44.1, at 461 (1989). A lessee who does not "make such payment when it is due is liable to the lessor for breach of a covenant to pay money," and is subject to an "action for damages for failure to pay royalties." *Ibid.*

b. The Fifth Circuit held, however, that an action to recover royalties is not an action for "money damages." The court relied on *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988), in which this Court held that an action for judicial review of an administrative decision denying a reimbursement to which the plaintiff claimed statutory entitlement was not an action for "money damages." Therefore, the action was not relegated to the Claims Court, but came within the waiver of sovereign immunity in the Administrative Procedure Act, 5 U.S.C. § 702. The *Bowen* Court contrasted an "action at law for damages—which are intended to provide a victim with monetary compensation for an injury" with "an equitable action for specific relief—which may include an

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[11] This does not mean that the MMS cannot engage in lengthy administrative review if it so desires. The agency merely has to take the same precautions as a private litigant similarly situated: either the MMS must obtain a waiver of the statute of limitations from the lessee, or it must file a protective lawsuit in district court. As this Court has recognized, the "fact that due deference to the administrative process should make a court hold its hand until the administrative proceedings * * * have been completed is a matter of judicial administration and of no relevancy" to the government's obligation under the statute of limitations to assert its rights properly and in a timely fashion. *Unexcelled Chemical Corp.*, 345 U.S. at 66 (citations omitted).

order providing for * * * the recovery of specific * * * monies." 487 U.S. at 893 (internal quotation marks omitted).

The analysis used in *Bowen* is problematical, however, when stretched to apply to an action founded on a contract. The government in fact acknowledged in this case that an overly literal application of *Bowen* to the issues raised by Section 2415(a) would not comport with common sense. It stated in the district court that a counterclaim "requesting an injunction enforcing orders requiring * * * payment of money" is a "complaint for money damages" under Section 2415(a). Memorandum in Support of Summary Judgment on Counterclaim 10 (Jan. 29, 1993). "Nothing in *Bowen* purported * * * to declare that a suit to enforce an order to pay does not constitute a suit for money damages within the meaning" of Section 2415(a). *Id* at 14.

Elsewhere, too, the government has acknowledged the breadth of Section 2415(a), pressing this Court for a common-sense reading of the phrase "action for money damages." When the government needed the shelter of the six-year limitations period in Section 2415(a), it characterized a contractual action for "money had and received" as an action for money damages. See *United States* v. *California*, 113 S. Ct. 1784, 1787-1788 (1993). The action for "money had and received" is what the *Bowen* analysis might characterize as an equitable action for the payment of specific money.

But under traditional views of contract actions, "a suit seeking to recover a past due sum of money that does no more than compensate a plaintiff's loss is a suit for damages, not specific relief." *Bowen*, 487 U.S. at 918 (Scalia, J., dissenting). In particular, an action to recover underpaid royalties is not an action for specific performance of the royalty agreement, but rather an action for damages for breach of the covenant to pay royalties—even though the

measure of the damages is the amount of royalties due.[12] The order to pay money in compensation for breach of a covenant to pay money gives the plaintiff the equivalent of specific relief, but the remedy remains one of damages. See, *e.g.*, 3 E.A. FARNSWORTH, FARNSWORTH ON CONTRACTS § 12.4 (1990).

Bowen's narrow reading of the term "money damages" should be confined to cases presenting circumstances similar to that case, and "should not be treated as a widely applicable, general rule for determination of the nature of the relief sought." *Native Village of Noatak* v. *Blatchford*, 38 F.3d 1505, 1513 (9th Cir. 1994). *Bowen* involved an attempt by the government to use a broad reading of "money damages" to deny litigants access to judicial review of administrative action in the district courts, while this case involves an attempt by the government to narrow the meaning of "money damages" in order to evade legislative limitations on its own power to sue.

Giving the terms in Section 2415(a) their "ordinary meaning," *Asgrow Seed Co.* v. *Winterboer*, 63 U.S.L.W. 4055, 4058 (U.S. Jan. 18, 1995), the term "money damages" appropriately reflects "the indiscriminate use of the word 'damages' in describing any award of money in an action based on contract, including instances in which the award amounts to specific relief." Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1157 (1970). For centuries, an action upon a contract for payment of a sum has been "nominally an action for damages" and "damages [have been] nominally recovered in it." *Robinson*

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[12] 3 E. KUNTZ, *supra*, § 44.1 at 461; 3 H. WILLIAMS & C. MEYERS, OIL & GAS LAW § 656.5, at 727 (1994). Cf. 3 D. DOBBS, LAW OF REMEDIES § 12.12(1), at 307, § 12.13, at 331 (2d ed. 1993) (distinguishing "action for the price" from action for specific performance); *id.* § 12.15(3), at 350 n.1 (action to recover back rent may be action for damages for breach of covenant to pay).

v. *Bland*, 2 Burr. 1077, 1086, 97 Eng. Rep. 717, 722 (K.B. 1760) (Mansfield, J.). This Court should not assume that the members of Congress were pedants who intended silently to carve out a huge loophole in Section 2415(a) based on an obscure and stilted characterization of a common contractual remedy. The scheme of Section 2415 does not evince any intention to leave any class of actions immune from limitation.

c. The structure of the statute, too, indicates that Congress intended to subject all contract actions to the six-year limit; the statute enumerates specific exceptions, such as contracts involving title to and possession of land (28 U.S.C. § 2415(c)). It seems curious at best that Congress would *exempt* from *all* limitations contracts that involved only the payment of money, such as loans (and loan guaranties) and mineral royalties. To the contrary, in enacting Section 2415(a) Congress clearly desired to put private litigants on equal footing with the government. *Crown Coat Front Co.*, 386 U.S. at 521 & n.14. A lessee who pays a disputed royalty and then sues for a refund is bound by a general limitations provision, 28 U.S.C. § 2401. Under those circumstances, it is difficult to understand why the government should have an unlimited time to pursue its remedies.

The legislative history dispels any doubt that an "action for money damages" under Section 2415(a) includes an action to enforce the payment of a sum owed under a contract. Both the Senate and the House Reports explained that Section 2415(a) "provides for a 6-year limitation which would apply to *all* Government actions based on contracts." S. Rep. No. 1328, *supra*, 1966 U.S.C.C.A.N. at 2504 (emphasis added); H.R. Rep. No. 1534, *supra*, at 4. The object of the legislation was "to provide a fair procedure which would have the effect of ending the possibility of *contracts litigation* after a fixed period." H.R. Rep. No. 1534, *supra*, at 8 (emphasis added). The Johnson Administration—which proposed Section 2415—quite clearly consid-

ered the six-year limitation to apply to "the assertion of Government claims *for money* arising out of an express or implied contract." Letter from Nicholas deB. Katzenbach, Attorney General, to Speaker of the House, reprinted in H.R. Rep. No. 1534, *supra*, at 11 (emphasis added). And the Senate sponsor used the same terms in his explanatory floor statement—the sole such floor statement in either house of Congress. 112 Cong. Rec. 14,378 (1966) (statement of Sen. Ervin). Thus, the legislative committees, the Senate sponsor, and the executive branch agreed that Section 2415(a) applied to all pecuniary contract claims asserted by the United States.

2. *At a Minimum, Section 2415(a) Applies to Administrative Orders to Pay Royalties*

Phillips' primary position, as argued above, is that the statute of limitations requires the government to file a judicial action on its contract claim within six years of the date when the underpayment occurred (leaving aside possible tolling). But if the court of appeals is correct that a judicial action to enforce an administrative payment order is not an "action for money damages" within the meaning of Section 2415(a), it hardly follows, as the court further held (App., *infra*, 3a & n.1), that government efforts to enforce pecuniary rights under mineral leases are free from *any* period of limitations. At most, it would mean that the government can act to end the running of the six-year limitations period by issuing an administrative payment order. See *3M*, 17 F.3d at 1457. No reasonable interpretation of Section 2415(a) permits the MMS to wait forever to bring its contractual claim.

* * * * *

In enacting the FOGRMA, Congress evidently assumed that the six-year limitation of Section 2415(a) would bar stale claims for unpaid royalties. The six-year record retention requirement in the FOGRMA is an express acknowledgement that royalty claims more than six years old are presumptively stale. See 30 U.S.C. § 1713(b). Cf. 5 C.F.R. § 1320.6(f)

(1994) (federal agencies normally authorized to require record retention for no more than three years). In addition, the only statute of limitations in the FOGRMA—relating to civil penalty actions—replicates the six-year standard of Section 2415(a). See 30 U.S.C. § 1755. In sum, for royalty contracts, as for other government contracts, Congress believed that a six-year period was sufficient to preserve the government's rights.

As Assistant Attorney General Douglas testified in presenting the original draft of Section 2415 to Congress, "potential defendants are entitled eventually to put to one side thoughts of possible suits against them." *Improvement of Procedures in Claims Settlement and Government Litigation: Hearings on H.R. 13650, H.R. 13651, H.R. 13652, and H.R. 14182 Before Subcomm. No. 2 of the House Comm. on the Judiciary*, 89th Cong., 2d Sess. 7 (1966). The decision of the Fifth Circuit allows the government to thwart that "policy of repose" (*ibid.*), and merely by engaging in administrative improvisation to "create the anomaly of a distinct class of actions subject to no limitation whatsoever" in spite of Congress's clearly contrary will. *Campbell* v. *Haverhill*, 155 U.S. 610, 616 (1895). This Court should grant review in order to restore to mineral lessees and other contractors the protection that Congress intended.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WILLIAM G. PAUL
KENNETH E. ROGERS
Office of the General Counsel
Phillips Petroleum Company
1260 Adams Building
Bartlesville, OK 74004

ARTHUR M. (RUSS) MEYER, JR.
T.L. (TOM) CUBBAGE II
Brown McCarroll &
Oaks Hartline
300 Crescent Court
Dallas, TX 75201-6929

ANDREW L. FREY
Counsel of Record
KENNETH S. GELLER
DONALD M. FALK
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0602

Counsel for Petitioner

JANUARY 1995

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1377

PHILLIPS PETROLEUM COMPANY,

Plaintiff-Appellant,

v.

GARY JOHNSON, Area Manager,
Dallas Area Compliance Office,
Minerals Management Service, et al.,

Defendants-Appellees.

ATLANTIC RICHFIELD COMPANY,

Plaintiff-Appellant,

v.

BRUCE BABBITT,
Secretary of Department of Interior, et al.,

Defendants-Appellees.

PHILLIPS PETROLEUM COMPANY,

Plaintiff-Appellant,

v.

GARY JOHNSON, Area Manager,
Dallas Area Compliance Office,
Minerals Management Service, et al.,

Defendants-Appellees.

PHILLIPS PETROLEUM COMPANY,

Plaintiff-Appellant,

v.

GARY JOHNSON, Area Manager,
Dallas Area Compliance Office,
Minerals Management Service, et al.,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Texas

(CA3:89-1707-H c/w 3:89-2393-H;
3:89-2727-H & 3:89-2751-H)

[Filed September 7, 1994]

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

Before SMITH and BARKSDALE, Circuit Judges, and WALTER,* District Judge.

JERRY E. SMITH, Circuit Judge:**

No member of this panel nor Judge in regular active service on the court having requested that the court be polled on rehearing en banc, the suggestion for rehearing en banc is

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* District Judge of the Western District of Louisiana, sitting by designation.

** Local Rule 47.5.1 provides "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

DENIED. The petition for rehearing is GRANTED so that we may address an issue that we inadvertently omitted from our previous opinion in this case. This supplemental opinion modifies our opinion issued on June 10, 1994, 22 F.3d 616 (5th Cir. 1994).

We previously reversed the district court's grant of summary judgment to defendants because we concluded that the MMS Procedure Paper was a substantive rule promulgated without notice and comment. Two of the four consolidated cases did not, however, involve the Procedure Paper. Concluding that the statute of limitations does not bar the agency's action, we affirm the district court's grant of summary judgment to defendants in those cases.

I.

Phillips contends that the MMS orders are invalid, as they cover royalties due from a period outside the six-year limitation period imposed by 28 U.S.C. § 2415(a), which bars "every action for money damages" brought by the United States unless the "complaint is filed within six years." Phillips and ARCO contend that (1) MMS orders are "actions," and (2) royalty demands are actions "for money damages."

The term "action for money damages" refers to a suit in court seeking compensatory damages. The plain meaning of the statute bars "every action for money damages" unless "*the complaint* is filed" within six years." (Emphasis added.) Thus, actions for money damages are commenced by filing a complaint. Actions that do not involve the filing of a complaint are not "action[s] for money damages." Since the government has filed no complaint,[1] the agency action is not an "action for money damages." Thus, § 2415 is no bar.

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[1] This suit is for declaratory judgment brought by Phillips and ARCO; moreover, the agency order cannot be construed as a complaint.

In addition, the meaning of the phrase "money damages" is narrowly construed. *See Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988) ("The fact that a judicial remedy may require one party to pay money to another is not sufficient reason to characterize the relief as 'money damages.'"). "Money damages" normally refers to a sum of money used as compensatory relief. *Id.* at 897.

By contrast, orders issued by MMS seek monies due under a contract with the government. Such contractual obligations cannot be considered compensatory. Agency orders are therefore not barred by the limitations period of § 2415. Consequently, we affirm the district court's grant of summary judgment to defendants on those causes not affected by the Procedure Paper. In all other respects, our prior opinion is unmodified. The judgment is AFFIRMED IN PART and REVERSED IN PART.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1377

PHILLIPS PETROLEUM COMPANY,

Plaintiff-Appellant,

v.

GARY JOHNSON, Area Manager, Dallas Area Compliance Office, Minerals Management Service, et al., Defendants-Appellees.

ATLANTIC RICHFIELD COMPANY,

Plaintiff-Appellant,

v.

BRUCE BABBITT, Secretary of Department of Interior, et al., Defendants-Appellees.

PHILLIPS PETROLEUM COMPANY,

Plaintiff-Appellant,

v.

GARY JOHNSON, Area Manager, Dallas Area Compliance Office, Minerals Management Service, et al., Defendants-Appellees.

PHILLIPS PETROLEUM COMPANY,

Plaintiff-Appellant,

v.

GARY JOHNSON, Area Manager, Dallas Area Compliance Office, Minerals Management Service, et al., Defendants-Appellees.

June 10, 1994

Before SMITH and BARKSDALE, Circuit Judges, WALTER,* District Judge.

JERRY E. SMITH, Circuit Judge:

In this consolidated appeal, plaintiffs Phillips Petroleum Company ("Phillips") and Atlantic Richfield Company ("Arco") appeal a summary judgment. Phillips and Arco contend that (1) the six-year limitations period of 28 U.S.C. § 2415(a) barred the administrative order issued by Minerals Management Service ("MMS") of the Department of Interior ("DOI") requiring the recalculation and payment of additional oil and gas royalties based upon an unpublished MMS royalty-valuation procedure (the "Procedure Paper"); (2) defendants failed properly to initiate an audit pursuant to the Federal Oil and Gas Royalty Management Act ("FOGRMA"), 30 U.S.C. §§ 1701-1757; and (3) MMS promulgated the Procedure Paper without notice and comment required under the Administrative Procedure Act of 1982 ("APA"), 5 U.S.C. §§ 552, 553. Phillips further asserts that defendants failed to comply with the Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520. Concluding that MMS promulgated a substantive rule without notice and comment, we reverse.

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* District Judge of the Western District of Louisiana, sitting by designation.

I.

A.

DOI is responsible for issuing and administering oil and gas leases for federal lands. 30 U.S.C. §§ 181, 223-237. FOGRMA directs the Secretary of Interior (the "Secretary") to establish "a comprehensive inspection, collection and fiscal and production accounting and auditing system to provide the capability to accurately determine oil and gas royalties, interest, fines, penalties, fees, deposits. and other payments owed, and to collect and account for such amounts in a timely manner." 30 U.S.C. § 1711(a). FOGRMA further provides that the Secretary "shall audit and reconcile, to the extent practicable, all current and past lease accounts for leases of oil or gas and take appropriate actions to make additional collections or refunds as warranted, . . . [and] may also audit accounts and records of selected lessees and operators." *Id.* § 1711(c)(1). MMS is the agency within the DOI that is responsible for auditing royalty payments on federal and Indian oil and gas leases.

Phillips and Arco hold numerous leases on federal and offshore lands. As lessees, they pay royalties to the government based upon the value of the production saved, removed, or sold from the leased premises. Up until March 1, 1988, DOI considered several factors in determining the value of federal offshore production for royalty purposes:

> The value of production shall never be less than fair market value. The value used in the computation of royalty shall be determined by the Director. In establishing the value, the Director shall consider: (a) The highest price paid for a part or for a majority of like-quality products produced from the field or area; (b) the price received by the lessee; (c) posted prices; (d) regulated prices; and (e) other relevant matters. Under no circumstances shall the value of production be less than the gross proceeds

> accruing to the lessee from the disposition of the produced substances or less than the value computed on the reasonable unit value established by the Secretary.

30 C.F.R. § 206.150 (1987).

On December 14, 1984, MMS developed new criteria for valuing natural gas liquid products ("NGLP's"),[1] as set forth in an unpublished internal agency paper referred to as the "Procedure Paper." Instead of considering the range of the various types of prices prescribed in the governing regulation, the Procedure Paper focused entirely upon one type of price, the spot market price:

> MMS will take the highest and lowest published price for the month from the appropriate [spot market price] bulletin. If the reported price [by the lessee] falls within this range, the [lessee's] value will normally be accepted by MMS for royalty determination purposes. . . .
>
> . . . .
>
> If the prices used to calculate royalties fall below this range, a minimum value that is acceptable to MMS can be determined by developing an average value from the lowest and highest prices in the range.

In a September 6, 1989, order, MMS advised Arco that it had audited royalty payments under five of Arco's federal offshore leases for the month of September 1983. MMS directed Arco to recalculate its royalties under the five leases,

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[1] When natural gas is produced that contains a high volume of liquefiable hydrocarbons (commonly known as "wet" gas), the gas is sometimes processed to separate the liquids from the dry methane, or "residue," gas. The liquids are then fractionated to separate the NGLP's, such as ethane, propane, butane, and natural gasoline.

using the Procedure Paper, for the period 1983-1989. In a September 7, 1989, order, MMS required Arco to recalculate and pay additional royalties for all federal offshore leases from 1983 to 1989. MMS sent Arco another order on September 29, 1989, requiring Arco to recalculate its royalties using the Procedure Paper for all federal offshore leases for a period from October 1980 to February 1988. MMS sent similar orders to Phillips in September 1989, requiring Phillips to recalculate and pay additional royalties, using the Procedure Paper, on all offshore leases between January 1977 and February 1988.

B.

Phillips filed three separate suits for declaratory and injunctive relief, disputing the validity of the MMS orders; at about the same time, Arco filed a similar action in the same court. The four cases were consolidated, and the parties filed cross-motions for summary judgment. The district court allowed the government to file a counterclaim seeking judicial enforcement of the orders, concluding that the statute of limitations provision of 28 U.S.C. § 2415(a) did not apply to the contested orders, and granted summary judgment on the government's counterclaim.

II.

The Procedure Paper is a "rule," and its promulgation constituted "rulemaking" within the meaning of the APA.[2]

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[2] Title 5 U.S.C. § 551(4) defines a "rule" as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes [various substantive agency functions] or practices bearing on any of the foregoing." Section 551(5) defines "rulemaking" as "agency process for formulating, amending, or repealing a rule." Indeed, MMS does not argue that its action was not rulemaking but only that the Procedure Paper was exempt from the APA's notice and comment provisions.

Section 553 of the APA provides that an agency must provide notice of a proposed rule in the Federal Register and afford an opportunity for interested persons to present their views. 5 U.S.C. § 553(b), (c). The required publication must be made not less than thirty days before the effective date of the proposed rule. *Id.* § 553(d). In promulgating the Procedure Paper, MMS did not attempt to comport with these requirements, as it argues that the requirements of § 553 do not apply to the APA.

The APA exempts "interpretative rules, general statements of policy, [and] rules of agency organization, procedure, or practice" from the notice and comment requirements. *Id.* § 553(b)(A). In the Procedure Paper itself, MMS attempted to avoid the notice and comment requirements of the APA by characterizing the rule as a "yardstick." The Interior Board of Land Appeals called the rule "essentially a policy guideline." *Conoco & ARCO Oil & Gas Co.*, 110 IBLA 232, 242-43 (1989). This court, however, must determine the category into which the rule falls: "[T]he label that the particular agency puts upon its given exercise of administrative power is not, for our purposes, conclusive; rather it is what the agency does in fact." *Brown Express, Inc. v. United States*, 607 F.2d 695, 700 (5th Cir.1979) (quoting *Lewis-Mota v. Secretary of Labor,* 469 F.2d 478, 481 (2d Cir.1972)). We review this legal issue *de novo*. *See Munn v. Algee,* 924 F.2d 568, 575 (5th Cir.), *cert. denied,* ___ U.S. ___, 112 S.Ct. 277, 116 L.Ed.2d 229 (1991).

A.

MMS argues that the Procedure Paper merely interprets the existing royalty valuation regulation in the context of NGLP's used internally and not sold. It is therefore a clarification or explanation of existing laws and regulations rather than a substantive modification of existing regulations or adoption of new ones. *See Continental Oil Co. v. Burns,*

317 F.Supp. 194, 197 (D.Del.1970). Consequently, MMS concludes, the Procedure Paper is exempt from the notice and comment requirements as an "interpretative rule."

"Interpretative rules" have been defined by this court in *Brown Express*: "Generally speaking, it seems to be established that 'regulations,' 'substantive rules,' or 'legislative rules' are those which create law, usually implementary to an existing law; whereas interpretative rules are statements as to what the administrative officer thinks the statute or regulation means." *Brown Express,* 607 F.2d at 700 (quoting *Gibson Wine Co. v. Snyder,* 194 F.2d 329, 331 (D.C.Cir.1952)). The Procedure Paper is not an interpretative rule, as it does not purport to interpret a statute or regulation. Notwithstanding MMS' assertion that the Procedure Paper announced the approach MMS would take in interpreting and applying 30 C.F.R. § 206.150, the Procedure Paper is not a mere clarification. It defines no ambiguous term. It gives no officer's opinion about the meaning of the statute or regulations. Rather, it effects a change in the method used by MMS in valuing NGLP's.[3] As such, it is a new rule and cannot be interpretative. Brown Express, 607 F.2d at 700.

B.

MMS also contends that the Procedure Paper may be characterized as a "general statement of MMS policy." A general statement of policy is a statement by an administrative agency announcing motivating factors the agency will consider, or tentative goals toward which it will aim, in

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[3] MMS claims that the Procedure Paper effects no change because MMS could have used spot market prices to value NGLP's not sold. Under 30 C.F.R. § 206.150, "posted prices" are but one factor to be used in valuing NGLP royalties. And rules are viewed as substantive when they "constrict the discretion of agency officials by largely determining the issue addressed." *Batterton v. Marshall,* 648 F.2d 694, 702 (D.C.Cir.1980) (footnote omitted).

determining the resolution of a substantive question of regulation. *Id.* at 701.

> A general statement of policy . . . is merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications. A general statement of policy, like a press release, presages an upcoming rulemaking or announces the course which the agency intends to follow in future adjudications.

Id. (quoting *Pacific Gas & Elec. Co. v. FPC,* 506 F.2d 33, 38 (D.C.Cir.1974)). The Procedure Paper, however, does none of these things. It does not set a goal that future proceedings may achieve, for the change has already been made. Immediately upon its effective date, the five-factor valuation technique of 30 C.F.R. § 206.150 was no longer to be followed. An announcement stating a change in the method by which an agency will value NGLP's is not a "general statement of policy." Thus, the Procedure Paper is not exempt from APA requirements as a "general statement of policy."

C.

Section 553(b)(A) also exempts "rules of agency organization, procedure, or practice." Although the Procedure Paper would appear to fall squarely within this exemption, for the change effected by the Procedure Paper plainly relates to the internal practices of MMS, the mere fact that it may guide MMS procedures does not mean that the Procedure Paper is a "procedural" rule for purposes of the APA.

The Supreme Court has stated that the notice and comment provisions "were designed to assure fairness and mature consideration of rules of general application." *NLRB v. Wyman-Gordon Co.,* 394 U.S. 759, 764, 89 S.Ct. 1426, 1429, 22 L.Ed.2d 709 (1969). These provisions afford an opportunity for "the agency promulgating the rule to educate

itself before establishing rules and procedures which have a substantial impact on those regulated." *Texaco, Inc. v. Federal Power Comm'n*, 412 F.2d 740, 744 (3d Cir. 1969). Congress realized that an agency's judgment would be only as good as the information upon which it drew. It prescribed these procedures to ensure that the broadest base of information would be provided to the agency by those most interested and perhaps best informed on the subject of the rulemaking at hand. *See Shell Oil Co. v. Federal Energy Admin.*, 574 F.2d 512, 516 (Temp. Emer. Ct. App. 1978).

The proper test to be applied in considering a rule that may arguably fall under the exemptions for "procedural rules" is as stated by *Brown Express*: "[W]hen a proposed regulation of general applicability has a *substantial* impact on the regulated industry, or an important class of the members or the products of that industry, notice and opportunity for comment should first provided." *Brown Express*, 607 F.2d at 702 (citation omitted). The exemption of § 553(b)(A) from the duty to provide notice by publication does not extend to those procedural rules that depart from existing practice and have a substantial impact on those regulated. Our inquiry, therefore, is not whether the rule is "substantive" or "procedural," but rather whether the rule will have a "substantial impact" on those regulated.

We conclude that the Procedure Paper does have a substantial impact on those regulated in the industry. The rule narrowly restricts the discretion of MMS officials in determining the value of NGLP's. It forecloses other valuation methods by prescribing binding valuation criteria. Although the regulation allows the use of posted prices in determining the value of NGLP's, the Procedure Paper

mandates the use of spot prices.[4] Thus, the Procedure Paper does not even comport with the regulation in using posted prices. Moreover, the Procedure Paper eliminates the other four factors in determining the value of NGLP's.

This change in valuation technique dramatically affects the royalty values of all oil and gas leases. Thus, the Procedure Paper should have been published in the *Federal Register* and offered for notice and comment. A party may not be adversely affected by a rule promulgated in violation of these requirements. 5 U.S.C. § 552(a)(1).

III.

We conclude that the Procedure Paper is a substantive rule, and § 553 of the APA controlled its promulgation. We therefore REVERSE the summary judgment and REMAND for such further proceedings as may be necessary.

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[4] A posted price is a publicly announced price at which a purchaser is willing to buy a certain type and amount of petroleum products. Spot prices, on the other hand, reflect actual transactions on a short-term or one-time basis.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3-89-CV-1707-H

(Consolidated with 3-89-CV-2393-H
3-89-CV-2727-H, and 3-89-CV-2751-H)

PHILLIPS PETROLEUM COMPANY,

Plaintiff,

v.

NICK L. KELLY, *ET AL.*

Defendants.

[Filed April 16, 1993]

JUDGMENT

Pursuant to this Court's Memorandum Opinion and Order dated September 18, 1992, the Court hereby orders, adjudges and decrees that the orders and decisions of the Department of the Interior challenged in the above-numbered cases and requiring plaintiffs Atlantic Richfield Company and Phillips Petroleum Company to recompute and pay any unpaid royalties due to the government are valid and enforceable. Specifically, the Court orders as follows:

(1) In *Phillips Petroleum Co. v. Kelly*, No. CA3-89-1707-H, Phillips is hereby ordered to comply with the challenged order dated June 5, 1989. That order requires Phillips to recompute and pay royalties on any proceeds received as Natural Gas Policy Act section 110 (Federal Energy Regulatory Commission Order 94) reimbursements on which royalty had not been paid for the period from July 25, 1980 to June 5, 1989, on all leases which Phillips acquired

from General American Oil Company of Texas. Administrative Record Vol. I, No. 6.

(2) In *Phillips Petroleum Co. v. Kelly*, No. CA3-89-2727-H, Phillips is hereby ordered to comply with the order dated September 26, 1989, by recomputing and paying royalties on any proceeds received as Natural Gas Policy Act section 110 (FERC Order 94) reimbursements on which royalty had not been paid for the period from July 1980 until September 26, 1989, for all leases which Phillips acquired from Aminoil. Administrative Record Vol. II, No. 5.

(3) In *Phillips Petroleum Co. v. Kelly*, No. CA3-89-2751-H, Phillips is hereby ordered to comply with the order dated September 27, 1989, by recomputing and paying royalties on Natural Gas Liquid Products (NGLP) extracted from gas produced from all of its offshore leases for the period from January 1977 through February 1988, except for NGLP extracted at the North Terrebonne gas plant. Administrative Record Vol. III, No. 1.

(4) In *Atlantic Richfield Co. v. Lujan*, No. CA3-89-2393-H, ARCO is hereby ordered to comply with the orders dated September 6 and 7, 1989, by recalculating and paying royalties due on gas produced from Arco's offshore leases and processed through the Yscloskey gas plant and disposed of under non-arms-length arrangements using the Mont Belview, Texas prices prescribed in the Procedure Paper methodology for the sales months October 1983 through February 1988. Administrative Record Vol. VI, Nos. 2 and 3. ARCO is also ordered to comply with the September 29, 1989 order by recomputing and paying additional royalties due for the NGLP extracted from gas produced from all of its Federal offshore leases and disposed of under non-arms-length arrangements using the same methodology for the period from October 1980 through February 1988 (except for gas processed at the Yscloskey gas plant, and limited to the period October 1981 through February 1988 for gas processed

at the Grand Chenier gas plant). Administrative Record Vol. VI, No. 1.

(5) Finally, this Court affirms the decision of the Interior Board of Land Appeals in *Conoco, Inc. and ARCO Oil and Gas Co.*, 110 IBLA 232 (1989), challenged in *Atlantic Richfield Co. v. Lujan*, No. CA3-89-2393-H. Accordingly, the order dated March 31, 1986 and reviewed in that administrative appeal is valid and enforceable. ARCO is hereby ordered to pay additional royalties on NGLP on the basis of the Mont Belview spot price for the period dated January 1980 through April 1983.

IT IS FURTHER ORDERED that the complaints filed in cases numbered CA-3-89-1707-H, CA-3-89-2393-H, CA-3-89-2727-H, and CA-3-89-2751-H are hereby dismissed with prejudice.

IT IS SO ORDERED.

/s/ Barefoot Sanders
United States District Court Judge

DATED: April 16, 1993.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3-89-CV-1707-H
(Consolidated with 3-89-CV-2393-H,
3-89-CV-2727-H, and 3-89-CV-2751-H)

PHILLIPS PETROLEUM COMPANY, Plaintiff,

v.

NICK L. KELLY, *ET AL.* Defendants.

[Filed March 26, 1993]

ORDER

Before the Court are cross-motions for summary judgment on the government's counterclaim: Defendants' Motion for Summary Judgment on the Counterclaim, filed February 1, 1993; the Memorandum of Phillips Petroleum Company ("Phillips") in Response to Defendants' Motion for Summary Judgment on Counterclaim, filed January 25, 1993; and the Opposition of Atlantic Richfield Company ("ARCO"), filed February 25, 1993. Also before the Court are ARCO's Motion for Summary Judgment on Counterclaim, filed December 15, 1992; Phillips' Motion for Summary Judgment on Federal Defendants' Counterclaim, filed February 1, 1993; and Defendants' Response to Plaintiffs' Motions for Summary Judgment on the Counterclaim, filed February 25, 1993.

The Court's September 18, 1992 Memorandum Opinion and Order seems to be the source of some confusion. To clarify, that order ruled that the MMS's orders issued to Phillips and ARCO were valid and enforceable. The Court's

judgment will reflect that the challenged orders will be enforced.

It is important to note that the Court's discussion of the statute of limitations found in 28 U.S.C. §2415 applies only to an "action for money damages." However, no such action is currently pending; the Court's discussion of section 2415 indicates how the Court would treat a claim for money damages if one were to be filed. *See Phillips Petroleum Company v. Kelly, et al.*, No. 3:89-CV-1707-H (N.D. Tex. filed September 18, 1992) at 23 ("[T]he Court concludes that the six year statute of limitations period affords the MMS ample time to investigate, verify, and choose the causes of action that it *will* pursue.") (emphasis added); 51 ("[T]he Government is precluded from bringing any causes of action against Phillips and ARCO based on royalty payments on the leases at issue here more than six years after the payments are due."). Thus, section 2415 has no direct application to the MMS orders. *See S.E.R., Jobs for Progress, Inc. v. United States,* 759 F.2d 1, 5 (Fed Cir. 1985).[1] In its counterclaim, the government asks for an injunction to enforce the Court's September 18, 1992 order. To the extent that the government's counterclaim seeks to enforce the Court's judgment, it is GRANTED.[2] To the extent that the government's counterclaim seeks further relief, it is DENIED without prejudice.

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[1] The Court notes that the Fifth Circuit has questioned a portion of the *S.E.R., Jobs for Progress, Inc.* decision. *See United States v. Popovich,* 820 F.2d 134 (5th Cir.), *cert. denied,* 484 U.S. 976 (1987). However, *Popovich* only addressed the portion of *S.E.R., Jobs for Progress, Inc.* which discussed laches.

[2] The Court notes that it retains the inherent power to enforce its judgments; the Court will do so when and if circumstances require enforcement of the judgment in this case.

The government is DIRECTED to submit by *noon, April 8, 1993* a proposed judgment which provides the remedies spelled out in the Court's September 18, 1992 Memorandum Opinion and Order—*i.e.*, that the IBLA decision and the MMS' orders to recompute and pay any unpaid royalties due to the government are valid and enforceable.

SO ORDERED.

DATED: March 26, 1993.

/s/Barefoot Sanders
Barefoot Sanders, Chief Judge
United States District Court
Northern District of Texas

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3-89-CV-1707-H
(Consolidated with 3-89-CV-2393-H,
3-89-CV-2727-H, and 3-89-CV-2751-H)

PHILLIPS PETROLEUM COMPANY, Plaintiff,

v.

NICK L. KELLY, *ET AL.* Defendants.

[Filed March 26, 1993]

ORDER

Before the Court are Atlantic Richfield Company's ("ARCO") Motion for Reconsideration, filed November 6, 1992; Defendants' Memorandum in Opposition, filed December 11, 1992; and ARCO's Reply, filed January 15, 1993.

In the present motion, ARCO asks the Court to reconsider several portions of the September 18, 1992 Order entered in this consolidated case. *See Phillips Petroleum Company v. Kelly, et al.*, No. 3:89-CV-1707-H (N.D. Tex. filed September 18, 1992). However, accepting the government's concessions (i.e. that the September 6 and 7, 1989 orders incorrectly directed ARCO to recalculate NGLP royalties using the Procedure Paper for periods after March 1, 1988, for certain leases and that the MMS has an auditor in residence at ARCO) as well as the government' stipulations, the Court concludes that ARCO's Motion for Reconsideration is DENIED.

SO ORDERED.

DATED: March 26, 1993.

/s/Barefoot Sanders
Barefoot Sanders, Chief Judge
United States District Court
Northern District of Texas

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3-89-CV-1707-H
(Consolidated with 3-89-CV-2393-H,
3-89-CV-2727-H, and 3-89-CV-2751-H)

PHILLIPS PETROLEUM COMPANY, Plaintiff,
v.
NICK L. KELLY, *ET AL.* Defendants.

[Filed January 7, 1993]

MEMORANDUM OPINION AND ORDER

Before the Court are Defendants' Motion to Alter or Amend Judgment, filed October 2, 1992; Atlantic Richfield Company's ("ARCO") Memorandum in Opposition, filed October 30, 1992; the Brief of Phillips Petroleum Company ("Phillips") in Opposition, filed November 2, 1992; and Defendants' Reply, filed December 22, 1992.

In the present motion, Defendants[1] request the Court to alter or amend its judgment pursuant to Federal Rule of Civil Procedure 59(e). Phillips and ARCO argue that this motion should be denied solely because a Rule 59(e) motion to alter or amend the judgment is inappropriate at this time, noting that a separate judgment has not been issued pursuant to Fed.R.Civ.P. 58. This contention is without merit. It would be manifestly wasteful to deny Defendant's motion on this ground alone, for the identical motion would be raised again once the Court enters a judgment. Therefore, the Court will

[1] Throughout this Opinion, the terms "government" and "Defendants" will be used interchangeably.

consider Defendants' motion to be a motion to reconsider its September 18, 1992 Memorandum Opinion and Order.

In their motion, Defendants request that the Court "restate its position on a factual matter in the record in order to perfect the decision for any appeal that may be taken." Motion at 1.

On September 18, 1992, the Court enter a Memorandum Opinion and Order in this case, ruling against the government on the statute of limitations issue presented by cross-motions for summary judgment. The Court concluded that the statute of limitations on federal lease royalties begins to run on the date that "the royalties [become] due and payable" and that the running of the statute is not tolled during the pendency of an audit. *See Phillips Petroleum Company v. Kelly, et al.*, No. 3:89-CV-1707-H (N.D. Tex. filed September 18, 1992) at 18, 21. In reaching this conclusion, the Court noted that:

> At one point, the Government suggests that Phillips and ARCO routinely revise their royalty reports and that the statute of limitations should not begin to run until royalty records are complete. There is no evidence that Phillips or ARCO revised their royalty reports or the payments at issue.

Id. at 11 n.10.

Defendants now argue that the record before the Court actually does contain an admission by Phillips that it revises its royalty reports. Defendants claim that in Appendix 21 to Phillips' Brief in Response and Opposition to Defendants' Motion for Partial Summary Judgment ("Phillips' Opposition"), Phillips' affiant Mark Haugland stated that such adjustments are made. In his affidavit, Haugland stated:

> 18. [Phillips] submits amended reports of sales and royalty adjustments as required by the applicable statutes and regulations of the MMS. It does not do so on a "regular" basis as is stated in paragraph 8 of

> the referenced brief [the government's summary judgment brief in the Northern District of Oklahoma]; but, the Company does submit them whenever a requirement to do so prompts the need for an amended filing.

Affidavit of Mark Haugland, submitted as Appendix 21 to Phillips' Opposition at 6. Defendants report that Phillips originally submitted the Haugland affidavit in a similar case filed in the United States District Court for the Northern District of Oklahoma. *See Phillips Petroleum Co. v. Lujan, et al.*, N. 89-C-887-B (N.D. Okla.), consolidated with *ARCO v. Lujan et al.*, No. 89-C-1052-D (N.D. Okla), on appeal, 963 F.2d 1380 (10th Cir. 1992).

Defendants complain that Phillips' brief filed in this Court cites only the language from the Haugland Affidavit which states that Phillips does not submit amended reports of sales and royalty adjustments "on a 'regular' basis" in an attempt to deflect attention from Haugland's statement elsewhere in the same sentence that adjustments are, in fact, made. *See* Phillips' Opposition at 8 n.2. Indeed, in its brief, Phillips indirectly refers to adjustments that are made to sales and royalty reports and argues that these adjustments are often made because of regulatory or statutory requirements. *See id.*

Defendants argue that, no matter how the reports should be characterized, Phillips has admitted that it does submit adjustments. Accordingly, Defendants request that the Court alter footnote 10 of its September 18, 1992 Opinion to reflect that Phillips' affiant, Haugland, has admitted that such adjustments are made.

Defendants explain this factual issue is significant because they have argued that the statutes of limitations cannot begin to run with respect to a payment which is not yet final. Defendants argue that this evidence shows that the responsible government officials do not know, and reasonably

could not know, of facts material to the government's right of action, and that the readjustments can accurately be described as an acknowledgment of a debt which causes a claim to accrue under the applicable statute of limitations.

The Court agrees that footnote 10 of the September 18, 1992 Memorandum Opinion and Order should be altered. Therefore, the Court concludes that footnote 10 be amended to read as follows:

> At one point, the Government suggests that Phillips and ARCO routinely revise their royalty reports and that the statute of limitations should not begin to run until royalty records are complete. There is no evidence that Phillips or ARCO voluntarily revised their royalty reports or the payments at issue. However, the Affidavit of Mark Haugland reveals that Phillips "submits amended reports of sales and royalty adjustments as required by the applicable statutes and regulations of the MMS. It does not do so on a 'regular' basis as is stated in paragraph 8 of the referenced brief; but, the Company does submit them whenever a requirement to do so prompts them need for an amended filing."

Defendants also request that the Court include in the record two voluminous affidavits that contain lists which detail adjustments that have been made to some of the sales and royalty reports of Phillips and ARCO. Specifically, these reports list thousands of adjustments to royalty values and/or sales values or quantities which Phillips and ARCO made during the period after October 1, 1983, for royalty payments originally made and reported for the period before October 1, 1983. Defendants note that these adjustments were submitted many months and years after the original payments and reports, and in some cases, more than six years after the original royalty payment was made. In support of the request to include these reports in the record of this case, Defendants

note that the record in the Northern District of Oklahoma case referred to above contained these reports.

Phillips and ARCO argue that to allow Defendants to include the proffered affidavit would be improper because this evidence was previously available to the parties. Phillips and ARCO note that the computer printouts that Defendants seek to have added to the record were originally available in the first half of 1990, years before the Court issued its September 18, 1992 Opinion. Since Defendants declined to introduce the printouts along with their other summary judgment evidence, Phillips and ARCO reason that Defendants should not be allowed to introduce such evidence now that the Court has ruled against them on the statute of limitations issue.

Defendants counter by noting that they are simply attempting to bring evidence referred to in one of Phillips' briefs to the attention of the Court, claiming that Phillips referred to the adjustments in its Opposition brief. Defendants argue that the Court misapprehended the significance of these adjustments, apparently based on the representations made in Phillips' brief.

The Court concludes that it is inappropriate to allow Defendants to bolster the record long after the Court has ruled on the summary judgment motions. As Phillips and ARCO note, the proper time to introduce summary judgment evidence has passed. The Court declines to accept more evidence at this late date. *See Waltman v. International Paper Co.*, 875 F.2d 468, 474 (5th Cir. 1989).

Finally, Defendants request that the Court alter its judgment to include a consideration of the impact of royalty adjustments on the running of the statute of limitations. Defendants contend that this issue is unresolved because the Court did not acknowledge Phillips' admission that such adjustments are made. Phillips argues that the fact it makes adjustments in the royalties and sales reports does not change the outcome of the Court's decision on the statute of

limitations issue. Phillips argues that the government's claim accrues at the time the contract allegedly is breached (i.e. when royalty payments initially are due), even though the precise amount of damages may not be available until later. It also notes that while adjustments may be made periodically, they are made only because federal statutes or regulations require them to be made.

The Court agrees with Phillips' conclusion that the presence of periodic adjustments does not affect the Court's statute of limitations holding. As discussed at great length in the Court's September 18, 1992 Memorandum Opinion and Order, alleged breaches of the OCS leases "occurred whenever royalties became due and were not fully paid." *Phillips Petroleum Company v. Kelly,* No. 3:89-CV-1707-H (N.D. Tex. filed September 18, 1992) at 13. While periodic adjustments of the amount due may affect the precise amount of damages, the adjustments do not affect the time at which the government's claim accrues and the statute of limitations begins to run. *See id.* at 16 ("The Government had the right to enforce the present causes of action when the royalty payments were due and allegedly underpaid in breach of the OCS leases, even though the precise amount of damages may not have been determined until later."). In the absence of fraud, this conclusion is not altered by the fact that adjustments may be made to the amount of royalties owed, no matter when they are made or for what reason they are made, for the government has the right to bring suit to collect the *total* royalty payment amount due for a specific period when the royalty payment is *first* due and payable. If an audit reveals that more royalties are owed for a specific period, the amount of damages from the breach of the contract to pay royalties increases; no new cause of action is created.

Similarly, the applicable statute of limitations is not tolled because of the presence of any adjustments. As the Court has previously noted, "'[u]ncertainty as to the exact amount of the Government's [damages] does not constitute a lack of

knowledge of a fact "material to the right of action."'" *Id.* at 22 (citation omitted). As noted in the Court's previous opinion, this conclusion indicates that the statute of limitations may not be tolled.

Conclusion

Defendants' motion is GRANTED in part and DENIED in part. Footnote 10 of the Court's September 18, 1992 Memorandum Opinion and Order is amended as indicated above; however, Defendants' request to amend the record to include the affidavits previously filed in the Northern District of Oklahoma is refused.

SO ORDERED.

DATED: January 7, 1993.

/s/Barefoot Sanders
Barefoot Sanders, Chief Judge
United States District Court
Northern District of Texas

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3-89-CV-1707-H
(Consolidated with 3-89-CV-2393-H,
3-89-CV-2727-H, and 3-89-CV-2751-H)

PHILLIPS PETROLEUM COMPANY, Plaintiff,

v.

NICK L. KELLY, Area Manager, Dallas Area Compliance Office, Minerals Management Service; BARRY WILLIAMSON, Director, Minerals Management Service of the Department of the Interior; MANUEL LUJAN, JR., Secretary of the Interior; MINERALS MANAGEMENT SERVICE of the United States Department of the Interior; and the UNITED STATES DEPARTMENT OF THE INTERIOR, Defendants.

September 24, 1992

ORDER

Before the Court are Defendants' Motion for Leave To File Amended Answers And Omitted Counterclaims, filed August 28, 1992; Atlantic Richfield's Memorandum in Opposition, filed September 17, 1992; and Phillips' Response in Opposition, filed September 21, 1992.

For the reasons articulated in this Court's Memorandum Opinion and Order in *Phillips Petroleum Company v. Kelly*, No. 3:89-CV-2670-H, filed September 24, 1992, Defendants'

Motion is GRANTED. The counterclaim attached to Defendants' motion will be filed. Furthermore, the counterclaim will relate back to the date of Defendants' answer.

SO ORDERED.

DATED: September 24, 1992.

/s/ Barefoot Sanders
Barefoot Sanders, Chief Judge
United States District Court
Northern District of Texas

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3-89-CV-1707-H
(Consolidated with 3-89-CV-2393-H,
3-89-CV-2727-H, and 3-89-CV-2751-H)

PHILLIPS PETROLEUM COMPANY, Plaintiff,

v.

NICK L. KELLY, Area Manager, Dallas Area Compliance Office, Minerals Management Service; BARRY WILLIAMSON, Director, Minerals Management Service of the Department of the Interior; MANUEL LUJAN, JR., Secretary of the Interior; MINERALS MANAGEMENT SERVICE of the United States Department of the Interior; and the UNITED STATES DEPARTMENT OF THE INTERIOR, Defendants.

[Filed September 18, 1992]

MEMORANDUM OPINION AND ORDER

Before the Court are three overlapping motions for summary judgment:

1.) Plaintiff Phillips Petroleum Company's ("Phillips") Motion for Partial Summary Judgment, filed August 16, 1991; Defendants' (collectively, for simplicity purposes, "the Government") Memorandum in Opposition thereto, filed October 18, 1991; Phillips' Supplemental Reply, filed July 9, 1992;

2.) Plaintiff Atlantic Richfield Company's ("ARCO") Motion for Summary Judgment, filed August 16, 1991; the Government's response thereto (contained in its October 18, 1991, Memorandum in Opposition); and ARCO's Reply, filed July 9, 1992;

3.) The Government's Motion for Partial Summary Judgment, filed May 16, 1991; ARCO's Brief in Opposition thereto, filed October 4, 1991; Phillips' Brief in Response and Opposition, filed October 18, 1991; and Defendants' Supplemental Brief, filed July 10, 1992.

Related to these motions are Plaintiffs' Joint Supplemental Brief, filed November 25, 1991; Defendants' Response thereto, filed December 6, 1991; Phillip's Reply, filed December 24, 1991; ARCO's Reply, filed January 6, 1992; and Defendants' Surreply, filed January 15, 1992. Finally, before the Court are Phillips's Brief In Re the One-Year Grace Period Provision of 28 U.S.C. § 2415, filed September 15, 1992; ARCO's Supplemental Brief, filed September 15, 1992; and the Government's Supplemental Brief Regarding One-Year Proviso of 28 U.S.C. 2415, filed September 15, 1992.

I. Background

Phillips and ARCO each produce oil and natural gas throughout the world. Among the leases they hold enabling them to do so are ones located on the outer continental shelf of the United States ("OCS") on lands owned by the federal government. Pursuant to the Outer Continental Shelf Lands Act, the Secretary of the Interior ("the Secretary") is responsible for the management of OCS leases. *See* 43 U.S.C.A. § 1337(a)(1) (West 1986). The Federal Oil and Gas Royalty Management Act ("FOGRMA") authorizes the Secretary to audit, and collect royalties on, these leases. *See* 30 U.S.C.A. § 1711 (West 1986); 30 U.S.C.A. §§ 181, 223-37 (West 1986 & Supp. 1992); *see also* 30 U.S.C.A. §§ 181-

287 (West 1986) (awarding the Secretary, via the Mineral Land Leasing Act, responsibility for mineral lands leases).

Pursuant to these statutory provisions and the terms of the OCS leases at issue in this suit, *see* Affidavit of S. Mark Haugland, filed August 16, 1991, Exhibits A–D, Phillips and ARCO paid monthly royalties to Defendant Minerals Management Service ("MMS"),[1] a division of Defendant Department of the Interior ("DOI"),[2] for the right to extract oil and gas from the leased properties. The MMS carries out its responsibilities through the Royalty Management Program.

Based on audits of sample OCS leases for production between October 1, 1980, and September 30, 1983, the MMS determined that Phillips and ARCO had underpaid royalties on natural gas liquid products ("NGLP's") produced on the OCS leases at issue here and used internally by Phillips and ARCO without being sold.[3] The MMS concluded that, in some cases, the underpayments were the result of Phillips and ARCO undervaluing the gas produced and, in other cases, the result of Phillips failing to pay on reimbursements for production-related costs. In all instances, the MMS determined that the alleged undervaluations were systemic

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[1] Beginning in 1982, the Secretary delegated the administrative responsibility for OCS leases to the MMS. *See* Secretarial order No. 3071 (Jan. 19, 1982), 47 Fed. Reg. 4757 (Feb. 2, 1982).

[2] The remaining Defendants are individual officers of MMS or the DOI sued in their respective capacities as such.

[3] The leases involved are Phillips's No. OCS-G 2712, No. OCSG 2301, No. OCS-G-2302; ARCO's lease No.'s 054-002919-0, 054-002636-0, 054-002637-0, 054-002640-0, and 054-004501-0; and eight leases identified as those acquired through a January 1, 1985, merger of Aminoil, Inc., into Phillips. The MMS approved the Aminoil merger on March 1, 1985, *see* A.R., Vol. II, No. 8, and its royalty calculation efforts were not delayed by it. See A.R. , Vol. III, No.'s 1, 7, 11.

shortcomings, meaning that they recurred with each royalty calculation.

Between June and September 1989, the MMS notified Phillips and ARCO of its determinations and directed both to recalculate royalties due on the OCS leases at issue for the periods in question.[4] *See* Administrative Record ("A.R."), Vol. I, No.'s 5, 6; Vol. II, No. 5; Vol. III, No. 1; Vol. VI, No.'s 1, 2, 3. Phillips and ARCO, disputing the MMS's calculation methods, filed the instant suits, Phillips initiating Civil Action No.'s CA3-89-CV-1707-H, CA3-89-CV-2727-H, and CA3-89-CV-2751-H, and ARCO bringing Civil Action No. CA3-89-CV-2393-H. In their respective actions, Phillips and ARCO seek declaratory judgments that the MMS orders are unlawful and injunctions enjoining Defendants from enforcing the orders in any respect. This Court consolidated the cases because the issues presented in all four overlap significantly. *See* Order of Consolidation, filed March 2, 1990.

Specifically, Phillips and ARCO maintain that, 1.) the statute of limitations codified at Title 28, United States Code, Section 2415(a) ("Section 2415[a]"), bars collection of royalties due and owing more than six years before the respective MMS orders were issued;[5] 2.) the MMS lacks authority to order the recalculations at issue because they amount to self-audits barred by FOGRMA; and 3.) the

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[4] The MMS's orders were given in letters addressed to Phillips's Bartlesville, Oklahoma, office and dated June 5, 1989, June 12, 1989, September 26, 1989, and September 27, 1989, respectively, and letters addressed to ARCO and dated September 6, 7, and 29, 1989, respectively.

[5] The relevant dates for the purposes of Section 2415(a) are the dates on which the Government files complaints, and not the dates of the MMS's orders. *See* 28 U.S.C.A. § 2415(a) (West Supp. 1992); *infra* pp. 9-10. Phillips and ARCO's implied position is that, if the MMS orders fell after the limitations period had expired, then subsequent Government suits would fall likewise, and, hence, be barred.

MMS's valuation procedures were invalid.[6] With respect to the latter issue, two of the consolidated cases[7] involve challenges to the MMS's assessments of reimbursements for production-related costs received based on orders from the Federal Energy Regulatory Commission ("FERC"), and two[8] involve challenges to royalty valuation regulations that were based on the "Procedure Paper on Natural Gas Liquid Products Valuation" ("Procedure Paper"). ARCO also challenges a decision of the Interior Board of Land Appeals ("IBLA") upholding use of the Procedure Paper by the MMS.

Phillips, ARCO, and the Government each move for summary judgment on all issues except the challenges based on the FERC orders. After reviewing the necessary summary judgment tenets, the Court addresses each issue in turn.

II. Summary Judgment

Summary judgment is proper when the pleadings and evidence on file show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment or partial judgment as a matter of law. Fed. R. Civ. P. 56. "Before a court may grant summary judgment, the moving party must demonstrate that it is entitled to judgment as a matter of law because there is no actual dispute as to an essential element of the plaintiff's case." *Christophersen v. Allied-Signal Corp.*, 902 F.2d 362, 364 (1990), *opinion*

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[6] Pivotal too is the parties' agreement that the agency orders at issue in this case are final for the purposes of review by this Court. *See* A.R., Vol. I, No.'s 1, 2; A.R., Vol. II, No.'s 1, 2; A.R., Vol. IV, No. 1; First Joint Status Report, filed October 27, 1989; Defendants' Motion for Partial Summary Judgment at 4, 6, 8; Phillips's Brief in Support of its Cross Motion for Partial Summary Judgment, filed August 16, 1991, at 2.

[7] Cases CA3-89-CV-1707-H and CA3-89-CV-2727-H.

[8] Cases CA3-89-CV-2393-H and CA3-89-CV-2751-H.

superseded on other grounds, 939 F.2d 1106 (1991), *cert. denied*, 112 S. Ct. 1280 (1992).

The Supreme Court has explained that a movant for summary judgment does not bear the burden of negating the nonmoving party's case with evidence; rather, the movant must show only that the opponent's case lacks the evidence it needs to support it. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324–26 (1986). The Fifth Circuit has held likewise, noting that the moving party is entitled to summary judgment when the motion's opponent fails to make a sufficient showing of proof, *see Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 920 (5th Cir. 1992) (quoting *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1195–98 [5th Cir. 1986]), although the evidence must be viewed in the light most favorable to the motion's opponent. *See Gremillion v. Gulf Coast Catering Co.*, 904 F.2d 290, 292 (5th Cir. 1990); *reh'g denied*, 909 F.2d 1479 (1990).

In sum, "(i)f the record taken as whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Friou v. Phillips Petroleum Co.*, 948 F.2d 972, 974 (5th Cir. 1991) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 [1986]).

III. Statute of Limitations

The Secretary is authorized to "establish a comprehensive inspection, collection and fiscal and production accounting and auditing system to provide the capability to accurately determine oil and gas royalties, interest, fines, penalties, fees, deposits, and other payments owed, *and to collect and account for such amounts in a timely manner.*" 30 U.S.C.A. § 1711(a) (West 1986) (emphasis added). In the present MMS orders, the Government seeks royalties on OCS leases for periods beginning as far back as January 1977, *see* A.R., Vol. III, No. 1, and the Court is now confronted with the issue of how forgiving of delays such as these Congress

intended FOGRMA and Section 2415(a) to be. Phillips and ARCO assert that Section 2415(a) bars recovery of any royalties due and owing more than six years before the MMS orders of June and September 1989. In addition, Phillips argues that the Government is barred from contesting the statute of limitations issue because the same issue was litigated in *Phillips Petroleum Co. v. Lujan*, No. 88-C-1487-E, 1989 WL 239616 (N.D. Okla. October 18, 1989).

Collateral Estoppel

As all parties now note, the decision in that case recently was reversed by the Tenth Circuit in *Phillips Petroleum Company v. Lujan*, 951 F.2d 257, 261 (1991) (*"Phillips I"*). Therein, Phillips sued the same defendants as are present in this case, challenging a September 30, 1988, MMS order requiring it to produce records relating to oil and gas leases for the period October 1, 1980, through September 30, 1983. Phillips, argued, *inter alia*, that the order was barred by a six-year statute of limitations, now codified at Title 28, United States Code, Section 2415. *Id.* at 259. The district court agreed and entered summary judgment in favor of Phillips. *Id.*

In reversing, the Tenth Circuit explained that the statutory provision authorizing the DOI to require lessees to maintain and provide records (30 U.S.C.A. § 1713[a] [West 1986]) was not subject to the statute of limitations. *Id.* at 259–60. To resurrect any meaningful impact from its collateral estoppel argument, Phillips now asks the Court to conclude that *Phillips I* was incorrectly decided and to adopt the district court's statute of limitations reasoning.

The Court finds no applicable reasoning to adopt. The issues in this case are distinct from those of *Phillips I;* at stake here are MMS orders to pay royalties, while *Phillips I*

involved an MMS order to produce documents.[9] The court in *Phillips I* also noted that,

> Defendants were not asserting a claim for underpayment of royalties. Had they been, plaintiff might have very well been able to assert a statute of limitations defense. Rather, defendants were merely ordering plaintiff to provide records. Such an order is well within defendants' authority under the lease agreements and under the pertinent statutes and regulations governing the management of royalty payments.

951 F.2d.at 259-60.

Because there were no audits or royalty valuations at issue in *Phillips I*, the Court concludes that the *dicta* quoted above simply explains when the Section 2415(a) limitations period is generally applicable in FOGRMA royalty cases. This conclusion is supported by the Tenth Circuit's subsequent declaration that, "(i)n *Phillips I*, we clearly held that although § 2415 may provide a legitimate defense to a claim for underpayment of royalties, it does not apply to limit the DOI's right under the FOGRMA to order lessees to maintain and provide records." *Phillips Petroleum Co. v. Lujan*, 963 F.2d 1380, 1386 (1992); *see infra* pp. 26–27.

Sections 2415(a) and 2416

The applicable statute of limitations inquiry begins with Section 2415(a), which provides that,

> (s)ubject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or

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[9] Thus, the collateral estoppel argument is misdirected.

> implied in law or fact, shall be barred *unless the complaint is filed within six years after the right of action accrues* or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later . . . .

28 U.S.C.A. § 2415(a) (West Supp. 1992). All parties agree that the six year limitations period governs the present causes of action. *See* Phillips's September 15, 1992 Brief, at 1; ARCO's September 15, 1992 Brief, at 1-2; Defendants' September 15, 1992 Brief, at 1; First Joint Status Report, filed April 9, 1990, at 2. Likewise, it is clear that the period will apply independently to each monthly royalty payment at issue. The questions are when the causes of action accrued and whether the six year period ever tolled subject to the referenced Section 2416.

Section 2416 reads as follows:

> For the purpose of computing the limitations periods established in section 2415, there shall be excluded all periods during which . . . facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances . . . .

28 U.S.C.A. § 2416 (West 1978).

Phillips and ARCO argue that a cause of action for underpayment of royalties accrues on the date that the royalties were due and that the Section 2415(a) period is tolled only in cases of fraud. The Government would have each cause of action accrue when the MMS completes the

pertinent audit showing that royalties have been underpaid,[10] pointing to a set of Medicare reimbursement cases in support of its position.

In the alternative, the Government argues that it reasonably could not have known that Phillips and ARCO underpaid royalties until the MMS had completed its audits and that the six year limitations period should have been tolled until that point. Noting the MMS's mountainous workload, the Government posits that it is not feasible for the MMS "to review each monthly payment as it is made." Memorandum in Support of Defendants' Motion for Partial Summary Judgment, at 27. Phillips and ARCO counter that such a view allows the Government to complete audits at its discretion because the six year period would not even begin to run until an audit is completed.

Thus, the Government asks the Court to categorically allow all audits to be completed before commencing the limitations period,[11] and Phillips and ARCO ask the Court to categorically require that all audits be completed and actions filed within the limitations period.

The parties' arguments demonstrate that Sections 2415(a) and 2416 blend almost to indistinction in this case. Indeed, the Government's alternate arguments are, in effect, identical. In the Government's script, royalty underpayment causes of

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[10] At one point, the Government suggests that Phillips and ARCO routinely revise their royalty reports and that the statute of limitations should not begin to run until royalty records are complete. There is no evidence that Phillips or ARCO revised their royalty reports or the payments at issue.

[11] All of the audits in this case were completed within six years of the corresponding MMS orders. *See, e.g.*, A.R., Vol. III, No. 11 (documenting that the audit on what originally were Aminoil leases was completed on September 30, 1983); *id.* at No. 1 (evidencing that MMS order was issued on September 27, 1989).

action accrue and are tolled at the same instant—the point when royalties are due.[12]

This merging, however, is no reason to ignore the accrual-tolling distinction inherent in the language of Sections 2415(a) and 2416, a distinction which may well be vital in other royalty cases. The Court's analysis proceeds accordingly.

Accrual of the Causes of Action

"No cause of action generally accrues until the plaintiff has a right to enforce his cause." *United States v. One 1961 Red Chevrolet Impala Sedan*, 457 F.2d 1353, 1358 (5th Cir. 1972) (citations omitted). More to the point with respect to this case, a cause of action based on contract generally accrues at the time of breach. *Pinnacle Port Community Ass'n, Inc. v. Orenstein*, 952 F.2d 375, 377 n.2 (11th Cir. 1992); *United States v. Kass*, 740 F.2d 1493, 1497 (11th Cir. 1984). The alleged breaches in the extant case occurred whenever royalties became due and were not fully paid. *See also United States v. Kass*, 740 F.2d at 1497 (ruling that, for Section 2415[a] purposes, Government's cause of action against doctor for Medicare overcharges accrued when

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[12] The Government relies on *Frey v. Production Co.*, 943 F.2d 578 (5th Cir. 1991), *opinion withdrawn in part on reh'g*, 951 F.2d 67 (5th Cir. 1992). There, the Fifth Circuit construed a Louisiana statute providing that royalty underpayment claims were subject to what was, in effect, a statute of limitations. 943 F.2d at 583. The statute declared that the three year period "commences to run from the day payment is eligible." *Id.* (quoting La. Civ. Code Ann. arts. 3494(5), 3495 [West Supp. 1991]). Despite the statute's plain language, the court concluded that the three year period did not begin to run "until the plaintiff could have known through the exercise of reasonable diligence that they had such a cause of action against Amoco." *Id.* at 587. The court held that payment by the lessee could not create knowledge of an underpayment in the lessor unless an inconsistency was obvious on the face of a royalty payment statement. *Id.* While the statute of limitations issues in *Frey* closely parallel the ones here, *Frey* involved Louisiana law.

overpayments were made); *Foster v. Atlantic Refining Co.*, 329 F.2d 485, 490 (5th Cir. 1964) (determining, in applying Texas law, that the applicable "statute [of limitations] begins to run on money due as royalty under a written contract when such money is due and payable"). Consistent with that conclusion are statutory and regulatory provisions that interest on unpaid royalties accrues beginning on the date that the royalties were due. *See, e.g.*, 30 U.S.C.A. § 1721(a), (f) (West 1986) (authorizing the Secretary to charge interest on underpaid royalties "for the number of days a payment is late"); 30 C.F.R. § 218.54(a) (1987) (declaring that, "[a]n interest charge shall be assessed on unpaid and underpaid amounts from the date the amounts are due"). In this case, there is no reason to conclude that the royalty causes of action accrued at any times other than the times of alleged breach.

The Medicare reimbursement cases, in which the Government sued for Medicare overpayments, while flush with cause of action accrual analyses, are notably distinguishable from the present action. The Medicare Act, 42 U.S.C.A. §§ 1395-95ccc (West 1992 & Supp. 1992), authorizes, in "Part A," hospital benefit for the aged and disabled. The Part A scheme, as constructed at the time, *see* 42 C.F.R. §§ 405.405, 405.06, 405.454, 405.1803 (1983),[13] was specific: First, insurance providers were reimbursed during the year for estimated services. 42 C.F.R. §§ 405.405, 405.454 (1983). Thereafter, as the First Circuit succinctly summarized in *United States v. Hughes House Nursing Home, Inc.*,

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[13] The present version of Section 405.405 can be found at 42 C.F.R. § 413.60 (1991); the present version of Section 405.454 can be found at 42 C.F.R. § 413.64 (1991); and the present version of Section 405.406 can be found at 42 C.F.R. § 413.20 (1991). *See* 51 Fed. Reg. 34790 (Sept. 1986). Section 405.1803, *see* 42 C.F.R. § 1803 (1991), was modified slightly in 1984, *see* 49 Fed. Reg. 322 (Jan. 1984), and again in 1986. *See* 51 Fed. Reg. 34793 (Sept. 1986).

> (a)t the end of each year, the provider is to give (a fiscal) intermediary a statement of its actual costs, 42 C.F.R. § 405406(b); the intermediary will then make an 'initial retroactive adjustment' bringing the money that the provider received in line with its costs as revealed in the statement. 42 C.F.R. § 405.454(f)(2). Subsequently, the intermediary is to audit the cost reports, to determine the 'reasonable cost' of the services. This audit 'constitute(s) the basis' for a *final* 'retroactive adjustment.' 42 C.F.R. § 405.1803(b); *see* 42 U.S.C.§ 1395x(v)(1)(A)(ii).

710 F.2d 891, 893 (1983) (emphasis in original). Consequently, when payments to the insurance provider are made under the Medicare Part A recovery scheme, they are only estimates of amounts due, and, by definition, no cause of action could accrue based on payments that are mere estimates.

Further, the scheme's lock-step progression must be completed before a plaintiff "has a right to enforce his (or her) cause" of action. *United States v. One 1961 Red Chevrolet Impala Sedan*, 457 F.2d at 1358; *see supra* p. 12.[14] As the court stated in *United States v. Gottlieb*,

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[14] For Section 2415(a) purposes, several courts have held that, due to the scheme, the Government's cause of action for Medicare overpayments accrues either when the final audit is completed or when the final retroactive adjustment is made. *See, e.g., United States v. Hughes House Nursing Home, Inc.* 701 F.2d at 894-95 (holding that cause of action accrues when final adjustment is made) ; *United States v. Gravette Manor Homes*, 642 F.2d 231, 234–35 (8th Cir. 1981) (holding likewise); *United States v. Withrow*, 593 F.2d 802, 806 (7th Cir. 1979) (deciding that cause accrues when audit is completed) ; *United States v. Graham*, 471 F. Supp. 123, 125 (S.D. Tex. 1979) (endorsing final adjustment rationale) ; *United States v. Gottlieb*, 424 F. Supp. 417, 420–21 (S.D. Fla. 1976) (similarly endorsing final adjustment rationale).

> under the statutory scheme, no 'final adjustment' is contemplated until 'an audit is made and the final liability of the program is determined.'. . . (N)o suit should be maintained until the final adjustment has been attempted as provided in the regulations. Therefore, until an attempted final adjustment, it cannot be said that plaintiff has a right to enforce his claim.

424 F. Supp. at 420–21 (quoting 20 C.F.R. § 405.454[f][2] [1976]).[15]

No such scheme for royalty recovery is mandated by FOGRMA; that an OCS lease account will be audited at all is guaranteed only "to the extent (it is) practicable" for the Secretary to conduct the audit. 30 U.S.C.A. § 1711(c)(1) (West 1986). Phillips and ARCO's royalty payments must be assumed final for the purposes of Section 2415(a). The Government had the right to enforce the present causes of action when the royalty payments were due and allegedly underpaid in breach of the OCS leases, even though the precise amount of damages may not have been determined until later. *See United States v. Gavilan Joint Community College Dist.*, 849 F.2d 1246, 1249–50 (9th Cir. 1988); *infra* p. 22.

The Government's position is problematic for other reasons. Were the Government's cause of action to accrue when the MMS completed an audit, it would allow the MMS to initiate and complete audits at its leisure, thereby giving it complete control over when the six year limitations period commences. Such unfettered discretion could leave OCS and

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[15] One other case offered by the Government, *United States v. International Assoc. of Firefighters*, 716 F. Supp. 656 (D.D.C. 1989), involving audits in the mineral leasing context, likewise hinges on a specific administrative scheme that dictates when the Government can sue. *See id.* at 657–60.

other lessees open to royalty-based litigation on a given lease for unnumbered years and would eviscerate the limitations period. The purpose of FOGRMA is "to require the development of enforcement practices that ensure the prompt and proper collection and disbursement of oil and gas revenues owed to the United States . . . ." 30 U.S.C.A. § 1711(b)(3) (West 1986). As the Ninth Circuit put it in *United States v. Joint Community College Dist.*, a case in which the Government sued to recover alleged overpayments of tuition and the same basic Section 2415(a) accrual question was at issue, "the Government here essentially asserts that it may postpone litigation indefinitely through delay in conducting its own audit. This is not a tenable position." 849 F.2d at 1249–50.

The Medicare Part A scheme, by contrast, explicitly provides a remedy if the audit and final determinations involved are not timely made. There, a provider who has not received a final determination within twelve months after filing the necessary reports is entitled to a hearing before the Provider Reimbursement Review Board. *See* 42 U.S.C.A. § 1395oo(a)(1) (West 1992); 20 C.F.R. § 405.1835 (1987).

To be sure, the MMS has statutory encouragement to initiate and complete its audits of OCS leases quickly. This, however, is no guarantee of prompt action. The Government, itself, represents that the MMS has taken on a heavy workload, and OCS lessees should not be penalized if it is unable to keep up. In this case, for example, Phillips was not ordered to recalculate certain royalties due for January 1977 until September 1989. *See* A.R., Vol. III, No. 1. The burden of maintaining records and anticipating litigation for uncounted years is not consistent with Section 2415(a), which was "designed to promote diligence by the government in bringing claims to trial and also to make the position of the government more nearly equal to that of a private litigant."

United States v. Kass, 740 F.2d at 1496[16] (citing *United States v. Cardinal*, 452 F. Supp. 542 [D. Vt. 1978] and S. Rep. No. 1328, 89th Cong., 2d Sess., *reprinted in* 1966 U.S.C.C.A.N. 2502).

The Government also argues that "the Interior's acceptance of the monthly royalty payments plainly is not a final determination of the royalty due," citing an IBLA decision[17] in support. Defendant's Memorandum in Opposition at 10 n.6. This view recycles the audit completion argument and would allow the Government to extend the time when each monthly royalty is due until the Government completes its audit. For reasons already discussed, this view is rejected.

The Court concludes that, for Section 2415(a) purposes, causes of action for underpayment of royalties on OCS leases accrue on the dates that the royalties are due and payable.

Tolling the Limitations Period

The Government, in its alternate argument, would have the Court toll the limitations period at the same time that it commenced. Citing the MMS's heavy workload,[18] the Government reasons that, "(t)o audit each one (lease) every

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[16] *Kass* involved Medicare *Part B* overpayment recovery claims. The Medicare Act's Part B scheme affords supplementary medical insurance benefits for the aged and disabled. 740 F.2d at 1494–95. Unlike Part A's very specific lock-step progression, Part B, just like FOGRMA's royalty payment scheme, requires only that payments be accurately and fully accounted for at the time that they are made. *See* 42 U.S.C.A. §§ 1395u(a), (b) (West 1992 & Supp. 1992).

[17] *Cities Service Oil and Gas Corp.*, 113 IBLA 255 (1990).

[18] As of December 31, 1989, the MMS was responsible for some 24,000 federal and Indian oil and gas leases. *See* MMS, Minerals Revenues 1989: Report on Receipts from Federal and Indian Leases 83 (1989).

month to verify the correctness of royalty payments immediately after they are made would require an army of auditors," Defendants' Memorandum in Opposition at 14, and that, without a complete audit, the MMS reasonably could not have known the facts material to any cause of action it might have.

The issue, however, cannot be framed around the MMS's workload and is not a matter of requiring monthly audits of every OCS lease. Indeed, the same reasoning behind the accrual of the Government's causes of action when royalties are due and underpaid prevents the Section 2415(a) limitations period from tolling.

In fact, the support for excluding periods of administrative delay from the Section 2415(a) limitations period is less than overwhelming. Section 2416's legislative history plainly establishes fraud as the driving force behind the "facts. . . not known and reasonably could not have been known" exclusion. The history states that,

> (t)he committee understands that the principal application of this exclusion will probably be in connection with fraud situations. An example would be where the affirmative act of a wrongdoer has served to conceal the fraudulent act. This type of exclusion is to be found in the law of many States in both fraud and tort limitations. The material facts that are not known must go to the very essence of the right of action.

S. Rep. No. 1328, 89th Cong., 2d Sess., *reprinted in* 1966 U.S.C.C.A.N. 2502, 2567-08. In the Eleventh Circuit's words, "[f]oremost in the enactment of § 2416 was the thought that the government should not be penalized if the *fraud* of an adverse party restricted its ability to discover a valid cause of action until long after its accrual." *United States v. Kass*, 740 F.2d at 1497 (emphasis in original). Echoes the Ninth Circuit, "[t]he legislative history expressly

states that the principal application of this exclusion was intended for situations involving fraud." *United States v. Gavilan Joint Community College Dist.*, 849 F.2d at 1249–50; *see also United States v. Batson*, 706 F.2d 657, 676-77 & n.30 (5th Cir. 1983) (referring in *dicta* to the primacy of the fraud rationale).

There is no evidence of fraud in this case.

Still, the same history offers a modicum of support for excluding from the limitations period some delay that can be attributed to the ponderous innerworkings of the Government's administrative agencies. The history includes this charge:

> Paragraph (c) of section 2416 excludes the time when facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with responsibility to act in the circumstances. This provision is required because of the difficulties of Government operations due to the size and complexity of the Government. It is not intended that the application of this exclusion will require the knowledge at the highest level of the Government. Responsibility in such matters may extend down to lower managerial levels within an agency.

S. Rep. No. 1328, 89th Cong., 2d Sess., *reprinted in* 1966 U.S.C.C.A.N. 2502, 2507. The length of delay that Congress intended be excusable under this rationale, however, is unclear. *See also United States v. Kass*, 740 F.2d at 1497 (opining that Congress envisioned "some delay"); *United States v. Incorporated Village of Island Park*, 791 F. Supp. 354, 372 (E.D.N.Y. 1992) (stating that, "[t]here is a reasonable question whether or not Section 2416[c] simply codifies the doctrine of fraudulent concealment").

At the outset, under the Section 2416 administrative delay rationale, there is no summary judgment evidence in this case from which the Court can exclude Section 2416 time periods from the Section 2415(a) limitations period. There is no evidence about the MMS's diligence in pursuing the audits involved and no evidence about the timing of the MMS' knowledge of the alleged underpayments beyond its correspondence to Phillips and ARCO based on the completion of its audits. *See* A.R., Vol. I, No.'s 5, 6; Vol. II, No. 5; Vol. III, No. 1; Vol. VI, No.'s 1, 2, 3 (including references to earlier notices).

The Court also rejects the Government's request to categorically toll the limitations periods regarding the leases at issue until the completion of the pertinent audits. The Court concludes that Section 2416 supports no such administrative delay. At the fore of the Court's consideration is a recurring potential for unfettered MMS discretion in the timing, and diligent pursuit, of its audits. *See supra* pp. 16-18. Because realization of that potential would be grossly unfair to OCS lessees; because any hints of an administrative delay rationale behind Section 2416 are secondary to that regarding fraud; and because the administrative delay rationale more directly runs contrary of the very purpose of Section 2415(a), the Court is of the opinion that the extent to which courts should tolerate such delay is lessened. This position is bolstered by the sense of urgency in FOGRMA, specifically, FOGRMA's goal of "prompt and proper collection and disbursement of oil and gas revenues," 30 U.S.C.A. § 1711(b)(3) (West 1986); *see supra* p. 16, and the Secretary's duty to collect and account for amounts due "in a timely manner." 30 U.S.C.A. § 1711(a) (West 1986); *see supra* p. 7.

As the Eleventh Circuit noted in *United States v. Kass*, the counsel of Section 2416's legislative history is that the "facts material to the right of action" are "the facts making up the "very essence of the right of action." *See* 740 F.2d at

1498 (1984) (relying on S. Rep. No. 1328, 1966 U.S.C.C.A.N. at 2508); *see also United States v. Beck*, 758 F.2d 1553, 1559 (11th Cir. 1985) (following the same standard). In this case, such facts would be those that inform the Government that an OCS lessee has underpaid royalties; the precise amount due need not be ascertained: "Uncertainty as to the exact amount of the Government's . . . (damages) does not constitute lack of knowledge of a fact 'material to the right of action.'" *United States v. Gavilan Joint Community College Dist.*, 849 F.2d at 1249.

Under FOGRMA's scheme, as well as in the case at bar, the Government need not complete its audits to discern the essence of its causes of action. In this case, in particular, there is no dispute that the leases at issue were conventional in the field; that Phillips and ARCO timely paid royalties; and that they timely submitted records to the MMS. Likewise, based on the record and the parties' representations, the audits involved were not problematic. *See, e.g.*, A.R., Vol. III, No. 11 (noting, in audit report, that lessee "was generally doing a good job in reporting and paying its royalties"). There is no evidence of delay on the part of the lessees or impeding complications surrounding the leases." *See, e.g., supra* note 3 (identifying leases at issue and noting that some were acquired through merger approved by the MMS).

The Government's burden seems especially tolerable with respect to Phillips. The MMS has a permanent audit office, manned by four auditors, on cite at Phillips's headquarters in Bartlesville, Oklahoma.[19] *See* Haugland Affidavit at ¶¶ 4-5. That office already conducts audits of Phillips's royalty payments "from time-to-time." *Id.* at ¶ 4.

To be sure, the MMS will need time to ascertain the details germane to any cause of action it might have. But, in

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[19] There is no evidence, one way or the other, regarding an MMS audit office located on site with ARCO.

the absence of summary judgment evidence to the contrary, the Court concludes that the six year limitations period affords the MMS ample time to investigate, verify, and choose the causes of action that it will pursue. As the MMS stated in responding to comments generated in the notice and comment process accompanying the promulgation of the most recent regulation addressing royalty valuation, *see infra* note 23, "MMS realizes that it must become increasingly familiar with transactions occurring in the areas where Federal and Indian leases are situated. By becoming more familiar and obtaining sales volume and price information, MMS will be able to identify anomalies that exist and review the circumstances involved in those transactions." 53 Fed. Reg. 1230 (Jan. 1988).

The Court holds that the Section 2415 six year period did not toll in this case. Holding otherwise would be manifestly unfair to the lessees. Therefore, the statute of limitations bars the Government from bringing any causes of action against Phillips and ARCO based on royalty payments on the leases at issue here that are due and owing for more than six years.[20]

IV. MMS's Authority to Order Royalty Recalculations

The MMS orders notified Phillips and ARCO that they had wrongly calculated royalties on the OCS leases and ordered them to review their calculations and recalculate the royalties due using procedures outlined in the Procedure Paper. *See* A.R., Vol. I, No.'s 5, 6; Vol. II, No. 5; Vol. III, No. 1; Vol. VI, No.'s 1, 2, 3. Phillips and ARCO argue that the MMS has no authority to order such recalculations

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[20] The Court notes that the United States District Court for the Northern District of Oklahoma recently reached similar conclusions regarding virtually identical statute of limitations issues. *See Atlantic Richfield Co. v. Lujan*, No. 89-C-892-B (N.D. Okla. filed September 9, 1992).

because they amount to "self-audits," which are prohibited by FOGRMA. The Government maintains that, when the MMS discovers a systemic error in a lessee's royalty payment procedures, such as the use of wrong royalty formulas, through an audit, the agency has authority to require lessees to review their records, account for royalties due, and make correct royalty payments. Such requirements, says the Government, do not amount to a self-audit.

Section 101 of FOGRMA provides that,

> (t)he Secretary shall audit and reconcile, to the extent practicable, all current and past lease accounts for leases of oil or gas and take appropriate actions to make additional collections or refunds as warranted. The Secretary shall conduct audits and reconciliations of lease accounts in conformity with the business practices and recordkeeping systems which were required of the lessee by the Secretary for the period covered by the audit. . . . The Secretary may also audit accounts and records of selected lessees and operators.

30 U.S.C.A. § 1711(c)(1) (West 1986). Phillips and ARCO suggest that the plain language of this provision dictates that only the Secretary—that is, the DOI, itself—may audit lease accounts, meaning that self-audits are prohibited. The Government counters that no self-audits are involved and that the Secretary is simply taking appropriate collection actions pursuant to Section 101.

The Secretary, through the MMS, already has conducted sample audits in this case, finding what it considered to be systemic errors, and the MMS's orders identify those errors, which serve as the bases for the recalculations ordered.[21]

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[21] This approach is entirely consistent with the legislative history behind Section 101, which states that the section,

As the Government notes, the MMS orders simply require Phillips and ARCO to correct the errors in their royalty calculation formulas already identified and to recalculate royalties based on the correct formulas; Phillips and ARCO are not asked to discover whether the same or any other royalty calculation formulas are in error. Such orders plainly fall within the scope of the Section 101's authorization to "take appropriate actions to make additional collections or refunds as warranted."

Further authority for the orders is found in Section 107 of FOGRMA. It provides that,

> In carrying out his duties under this chapter the Secretary may conduct any investigation or other inquiry necessary and appropriate and may conduct, after notice, any hearing or audit, necessary and appropriate to carrying out his duties under this chapter. In connection with any such hearings, inquiry, investigation, or audit, the Secretary is also authorized where reasonably necessary—
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> (1) to require by special or general order, any person to submit in writing such affidavits and answers to questions as the Secretary may reasonably prescribe, which submission shall be made within

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directs the Secretary to audit and reconcile all lease accounts or accounting line items and to take appropriate actions to make additional collections or refunds as warranted. The Secretary is authorized to select lease or payor accounts for audit on his own initiative—since auditing every account on an annual basis is clearly impractical—but the Committee intends that the Secretary will establish the means whereby all major accounts will be audited, at lease (sic) in whole or in part, annually and other accounts to the extend (sic) that the Secretary determines is sufficient.

H.R. 97-859, 97th Cong. 2d Sess., *reprinted in* 1982 U.S.C.C.A.N. 4268, 4287.

> such reasonable period and under oath or otherwise, as may be necessary. . . .

30 U.S.C.A. § 1717(a) (West 1986). The legislative history behind this provision explains that, "(t)he Committee intended that the Secretary have broad enforcement authority relating to his royalty and lease management functions." H.R. 97-859, 97th Cong. 2d Sess., *reprinted in* 1982 U.S.C.C.A.N. 4268, 4286.

In addition, as the Court already has noted, Congress instructed that the Secretary "ensure the prompt and proper collection and disbursement of oil and gas revenues" with respect to all OCS leases. 30 U.S.C.A. § 1701(b)(3) (West 1986). Requiring the MMS to conduct all royalty calculations needed to correct systemic errors discovered in MMS audits of OCS leases, as the logical extension of Phillips and ARCO's position would have the Court do, would defeat this fundamental FOGRMA purpose in every meaningful respect.

Almost identical self-audit arguments were presented to the Tenth Circuit in *Phillips Petroleum Company v. Lujan*, 963 F.2d 1380 (1992) *("Phillips II")*. There, Phillips and ARCO sought declaratory relief against the same defendants identified in this case, challenging MMS orders requiring Phillips and ARCO to retain oil and gas lease records for the period October 1, 1983, through September 30, 1989, and initiating company-wide audits "of the propriety of the royalty and other payments made by Phillips (and ARCO). . . ." during the same period. *Id.* at 1382. Phillips argued that the company-wide audit would require it to audit its own records once one of its accounting procedures had been deemed erroneous.

The district court rejected this and Phillips and ARCO's other challenges, awarding summary judgment to the defendants. *Id.* at 1383. The Tenth Circuit affirmed, concluding that evidence of the company-wide audit procedures "clearly indicates that the MMS will ask Phillips

and other lessees to make changes to correct repeated royalty underpayments caused by systemic deficiencies" and that, "(s)uch a request falls squarely within the purposes of FOGRMA."[22] *Id.* at 1386.

The recalculations ordered in this case differ in no meaningful respect from those ordered in *Phillips II*. The Tenth Circuit's rationale therein applies with equal force to this case. *See also Amoco Prod. Co.*, 123 IBLA 278, 284-85 (June 18, 1992) (rejecting same self-audit arguments urged by Amoco Production Co.).

There is no genuine issue of fact material to the "self-audit" arguments; that the MMS has authority to order recalculations once a systemic error has been identified is clear.

With the Government's authority to order recalculations of the type at issue herein established, the question becomes whether the recalculations ordered in this case were proper. Thus, the Court turns to Phillips and ARCO's contention that the Government's royalty valuations were invalid.

V. The Government's Royalty Valuations

The authority to determine royalties owed on production from OCS leases rests with the DOI. The royalties due in this case depend on the value assigned to production, and the Director of the MMS is responsible for determining that

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[22] Phillips and ARCO also presented in *Phillips II* the same statute of limitations arguments they urge herein. Relying on its opinion in *Phillips I*, the Tenth Circuit rejected those arguments with respect to the MMS's order to retain records. *See* 963 F.2d at 1386. The court did not reach the statute of limitations arguments as they concerned the order initiating audit procedures.

value.[23] *See* 30 C.F.R. § 206.150 (1987). Contrary to ARCO's assertions, there is no burden on the MMS to determine that the lessee's valuations are unfair or unreasonable before imposing its valuations on the lessee. *See Mesa Operating Ltd. Partnership v. United States Dept. of the Interior*, 931 F.2d 318, 323 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 934 (1992); *see also* 30 C.F.R. § 206.150 (1987) (outlining Secretary of the Interior's valuation authority).

The valuations at issue here were governed by DOI regulation "Section 206.150"[24] which, at the time of the MMS orders, read as follows:

> The value of production shall never be less than the fair market value. The value used in the computation of royalty shall be determined by the Director. In establishing the value, the Director shall consider: (a) the highest price paid for a part or for a majority of like-quality products produced from the field or area; (b) the price received by the lessee; (c) posted prices; (d) regulated prices; and (e) other relevant matters. Under no circumstances shall the value of production be less than the gross proceeds accruing to the lessee from the disposition of the produced substances or less than the value computed on the reasonable unit value established by the Secretary.

30 C.F.R. § 206.150 (1987). In this case, the MMS cited Section 206.150 when ordering Phillips and ARCO to

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[23] The leases at issue in this case, with the exception of the Phillips's "section 6" lease, echo the DOI's right to calculate production value. *See* Haugland Affidavit at Exhibits A, B, C. The section 6 lease is silent on the issue. *See id.* at Exhibit D. That silence, however, does not impede the DOI's express regulatory authority.

[24] The MMS has since revised its gas royalty valuation regulations. The latest version, 30 C.F.R. § 206.153 (1991), became effective March 1, 1988. *See* 53 Fed. Reg. 1230 (1988).

recalculate royalties. In addition, the MMS orders looked to the Procedure Paper, a document issued by the Royalty Valuation and Standards Division of the Royalty Compliance Division of the MMS on December 14, 1984, modified by the MMS on February 25, 1985, and modified by the IBLA in *Conoco, Inc., and ARCO Oil and Gas Co.*, 110 IBLA 232 (August 29, 1989) *("Conoco")*. The Procedure Paper purports to set forth a "yardstick valuation technique" to assist applications of Section 206.150. A.R., Vol. IV, No. 19, Attachment 1, unnumbered p. 2.

Phillips and ARCO now argue that one guideline set forth in the Procedure Paper, summarized by Phillips as "the published spot price in a particular commercial bulletin for a particular location," Phillips's Brief in Response at 16, became the MMS's sole consideration in valuing production, and hence, that the MMS failed to properly consider all of the valuation factors set forth in Section 206.150. Further, the MMS's use of the Procedure Paper, say Phillips and ARCO, amounted to rulemaking in violation of the notice and comment requirements of the Administrative Procedure Act ("APA"), 5 U.S.C.A. §§ 551-59 (West 1977 & Supp. 1992). In addition, to the extent that it approves the Procedure Paper, ARCO asks this Court to set aside the IBLA's *Conoco* decision.

In the alternative, Phillips and ARCO contend that the DOI failed to publish the Procedure Paper in the *Federal Register* pursuant to the APA's requirement that all substantive rules of general applicability and statements of general policy be so published, and that the application of the paper in this case violated other prohibitions against retroactive agency action.

Phillips and ARCO's first set of arguments boils down to two issues: a.) the validity of the MMS's production valuations; and b.) the impact of the APA's rulemaking

requirements on the Procedure Paper. Because the second issue affects the first, the Court begins its inquiry there.

Notice and Comment Rulemaking and the Procedure Paper

Section 553[25] of the APA requires that an agency promulgating a rule afford the public opportunity to have input into the rulemaking process by giving general notice of the proposed rule in the *Federal Register* and providing interested persons a chance to comment on the rule. *See* 5 U.S.C.A. § 553(b), (c), (d) (West 1977); *Batterton v. Marshall,* 648 F.2d 694, 711 (D.C. Cir. 1980). In this case, it is undisputed that these procedures were not followed; the Government argues simply that the Procedure Paper does not constitute a rule for APA purposes, and, therefore, is not subject to the APA's rulemaking requirements.

The APA defines a rule as,

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or proscribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor *or of valuations, costs, or accounting, or practices bearing on any of the foregoing*. . . .

5 U.S.C.A. § 551(4) (West 1977) (emphasis added). Whether an agency's promulgation constitutes a rule is a matter of the item's substance and not the label given to it by the agency. *United States Dep't of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1149 (5th Cir. 1984) (citations omitted).

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[25] Meaning the section number as codified in Title 5 of the United States Code.

Consequently, for the purposes of this case, the Procedure Paper's "yardstick" terminology, by itself, has no effect. Rather, what is significant is that the Procedure Paper directly influences the valuation of NGLP's; whether it contains simple guidelines, descriptions, procedures, or binding dictates, the Procedure Paper qualifies as a rule under the APA's general definition.

That is not to say, however, that the paper is subject to the APA's notice and comment requirements. Indeed, exempted from those requirements are "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C.A. § 553(b)(A) (West 1977).

The Procedure Paper, on its face, appears to fall under this exemption as either interpretive or procedural.[26] Courts have characterized those rules that merit notice and comment procedures as "substantive" rules, *see American Trucking Ass'n, Inc. v. United States*, 688 F.2d 1337, 1351 (11th Cir. 1982), *rev'd on other grounds*, 467 U.S. 354 (1984), and the distinction between substantive and interpretive rules beckons the Court here.

The distinction was a genesis of *Conoco*, a case in which ARCO and Conoco, Inc., challenged the Procedure Paper with the same arguments presented here. There, the IBLA concluded that the paper was not a substantive rule subject to the APA's notice and comment requirements, reasoning as follows:

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[26] The distinction between interpretive and procedural rules has not been a burning issue for the courts. *See American Trucking Ass'n, Inc, v. United States*, 688 F.2d at 1351 (noting the difference and crediting the Fifth Circuit's *Brown Express, Inc. v. United States*, 607 F.2d 695, 702 [1979]); *see also Jean v. Nelson*, 711 F.2d 1455, 1479 (11th Cir. 1983) (summarizing *American Trucking), rev'd in part on other grounds*, 727 F.2d 957 (1984), *aff'd*, 472 U.S. 846 (1985).

> Substantive rules have the force of law where they constitute a substantive modification of an existing regulation, adoption of a new regulation, or a change in policy. The Procedure Paper merely clarified the existing regulations by setting forth a yardstick by which MMS would measure the reasonableness of royalty values reported by lessees. It did not require lessees to value their production by any specific method, nor did it modify any existing regulation. Rather, it found that, after consideration of the reasonable value of NGLP (natural gas liquid product) in situations where no arm's-length contract existed was the commercially available spot price bulletins. We find the Procedure Paper to be essentially a policy guideline adopted by MMS to assist in valuing NGLP production for royalty purposes under the provisions of the relevant regulation. As such, it does not have the force and effect of law as a duly promulgated regulation does, and the Board will decline to follow it where it is inconsistent with the terms of the relevant regulations.

110 IBLA at 242–43, A.R., Vol. IV, No. 1 (citations omitted). During its assessments of the valuations at issue in *Conoco*, the IBLA modified the Procedure Paper in one respect, stating that "we are unable to affirm the application of the Procedure Paper to the extent it is used to value NGLP production at a price in excess of the fair market value floor price. . . ." *Id.* at 244.

This Court may set aside the MMS's orders or the IBLA's determination to the extent that they or it wrongly apply the Procedure Paper if the Court finds that the any of the actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C.A. § 706(2) (West 1977). The Court "must consider whether the (agency's) decision was based on a consideration

of relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volne*, 401 U.S. 402, 416 (1971); *see Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984). Put another way, the Court may reject the orders or the determination "only if the agency's interpretation is *impermissible* or *unreasonable*." *Mesa Operating, Ltd. Partnership v. United States Dept. of the Interior*, 931 F.2d at 323 (emphasis in original). Significantly, "(t)his standard is even more deferential where . . . a Court is reviewing an agency's application and interpretation of its own regulations." *Citizens for Fair Util. Regulations v. United States Nuclear Regulatory Comm'n*, 898 F.2d 51, 54 (5th Cir.) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 [1989]), *cert. denied*, 111 S. Ct. 246 (1990); *see Udall v. Tallman*, 380 U.S. 1, 16–17 (1965).

With this standard in mind, the Court conducts its substantive/interpretive rule analysis. Whether a rule is substantive or interpretive is a question of law for the Court. *Trinity Indus., Inc. v. Dole*, 760 F. Supp. 1194, 1198 (N.D. Tex. 1991) (Belew, J.) (citing *Reeder v. FCC*, 865 F.2d 1298 [D.C. Cir. 1989]), *vacated on other grounds*, 963 F.2d 795 (5th Cir. 1992).

Substantive rules are "those that '*effect a change* in existing law or policy,'" *Mount Diablo Hosp. Dist. v. Bowen*, 860 F.2d 951, 956 (9th Cir. 1988) (emphasis in original), that is, those that are binding, *Western Coal Traffic League v. United States*, 694 F.2d 378, 392 (5th Cir. 1982), *cert. denied*, 466 U.S. 953 (1984), or have the force of law. *Ohio Dep't of Human Servs. v. United States Dep't of Human Servs., Health Care Financing Admin.*, 862 F.2d 1228, 1233 (6th Cir. 1988). An interpretive rule, undefined in the APA, is "merely a clarification or explanation of an existing statute or rule." *Id.* (quoting *Guardian Fed. Sav. & Loan Ass'n v. Federal Sav. & loan Ins. Corp.*, 589 F.2d 658, 664 [D.C.

Cir. 1978]). Interpretive rules "are not determinative of issues or rights addressed", and "do not. . . foreclose alternate courses of action or conclusively affect rights of private parties." *Batterton v. Marshall*, 648 F.2d 694, 702 (D.C. Cir. 1980).[27]

The District of Columbia Circuit provided this oft repeated insight:

> Generally speaking, it seems to be established that 'regulations,' 'substantive rules' or 'legislative rules' are those which create law, usually implementary to an existing law; whereas interpretative rules are statements as to what the administrative officer thinks the statute or regulation means.

Cabais v. Egger, 690 F.2d 234, 238 (1983) (quoting *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 [D.C. Cir. 1952]); *see Brown Express, Inc. v. United States*, 607 F.2d at 701 (quoting the same language with approval); *Rivera v. Becerra*, 714 F.2d 887, 890–91 (9th Cir. 1983) (endorsing the *Cabais v. Egger* view), *cert. denied*, 465 U.S. 1099 (1984).[28]

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[27] The District of Columbia Circuit announced these conclusions with respect to all of the non-binding actions specified in 5 U.S.C.A. §§ 553(b)(3)(A), (d)(2) (West 1977). *See* 648 F.2d at 701. Therefore, the conclusions apply to each such action, individually. *See id.* at 701–02.

[28] Other definitional commentary is available. For example, in the words of the 1947 Attorney General's Manual on the APA, as quoted by the Fifth Circuit, interpretive rules are "'rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'" *Brown Express, Inc. v. United States*, 607 F.2d at 700. Similarly, the Ninth Circuit has presented this view:

> In determining whether a rule is interpretive or substantive, two factors must be considered. The first factor is whether the rule modifies existing rights, law, or policy. If the

Whether a rule is substantive or interpretive is a matter of its substance and application; labels or phraseology used in the rule's text are not dispositive, and can be misleading. *See United States Dep't of Labor v. Kast Metals Corp.*, 744 F.2d at 1149; *American Trucking Ass'ns, Inc. v. I.C.C.*, 659 F.2d at 463; *Pharmaceutical Mfrs Ass'n v. Finch*, 307 F. Supp. 858, 863 (D. Del. 1970). Therefore, for resolution in the present case, the Court looks to both the substance, and the application, of the Procedure Paper.

The substance of the Procedure Paper is instructive. To begin, the paper explains its purpose as follows:

> Recent reviews of gas plants by the Royalty Compliance Division and the Office of Inspector General have raised questions regarding the appropriate method of valuing natural gas liquid products (NGLP's) extracted from gas produced on Federal and/or Indian lands. This valuation problem is particularly prevalent in cases where NGLP's have been transferred internally between affiliated entities.
>
> MMS regulations require the Secretary to establish a basis for computing royalties using a reasonable unit value. *This value should never be less than the fair market value as determined by*

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rule 'effect(s) a change in existing law or policy,' or '"affect(s) individual rights and obligations,"' the rule is substantive. If the rule is only indicative of the agency's interpretation of existing law or policy, it, is interpretive.

Second, the source of the rule must be considered. If it is promulgated pursuant to statutory authority, it is a substantive rule. If the agency does not exercise delegated legislative power to promulgate the rule, it is interpretive.

W.C. v. Bowen, 807 F.2d 1502, 1504 (1987) (citations omitted), *opinion amended and reh'd denied*, 819 F.2d 237 (1987).

> *guidelines established by the Secretary.* At a minimum, royalties must be paid on the gross proceeds accruing to the lessee.
>
> *The purpose of this paper is to develop a 'yardstick' valuation technique for determining the reasonableness of a lessee's NGLP Prices.*

A.R., Vol. IV, No. 19, Attachment 1, unnumbered p. 2 (footnote omitted, emphasis added).

> The Procedure Paper further states that,
>
> in an effort to develop a yardstick. . . *the following sources were considered:*
>
> - *NGLP sales contracts*
> - *Prices received by lessees*
> - *Table 7 (DOE) prices*
> - *Commercially available NGLP Bulletins*
>
> *A study of these sources* concluded that commercial price bulletins represent the best available price source and in most instances are indicative of NGLP fair market value.

Id. at unnumbered p. 4 (emphasis added).

The foregoing provisions are dispositive. They establish that the Procedure Paper is governed by Section 206.150 and that the paper's guidelines are driven by the regulation's core dictate that production value should never be less than fair market value. Further, while Phillips and ARCO contend that Section 206.150 requires the MMS to consider all five of the valuation factors set forth in its text, and the Court agrees, 30 C.F.R. § 206.150 (1987) (providing that, "[i]n establishing the value, the *Director, shall consider.* . . . ") (emphasis added), the paper documents that the MMS has considered these factors in the form of NGLP sales contracts, prices

received by lessees, Table 7 (DOE) prices, and commercially available NGLP bulletins. Moreover, while all five valuation factors need to be considered, it is inevitable that one factor ultimately may carry more weight than the others. The paper simply concludes that, after considering all five factors, one is more indicative of fair market value than the others.

The paper continues:

> To establish a yardstick to compare to the lessee's reported prices, MMS will take the highest and lowest published prices for the month from the appropriate bulletin. If the reported price falls within this range, the value will normally be accepted by MMS for royalty determination purposes. . . . If the prices used to calculate royalties fall below this range, a minimum value that is acceptable to MMS can be determined by developing an average value from the lowest and highest prices in the range.

Id. at unnumbered pp. 4-5.

This provision and others that follow document that the price received by the lessee is considered and receives a great deal of deference in the paper's recommendations. The paper also includes a Table of Price Sources that offers "suggested locations" for obtaining NGLP price sources for different producing areas in the United States, stressing with respect to those locations that, "each valuation case should be separately evaluated to determine if an alternate location would be more pertinent than the suggested location." *Id.* at Procedure Paper Attachment 1 (unnumbered p. 10). In effect, the paper creates a list of sources to be consulted for "spot prices," which are equivalent to the Section 206.150 valuation factor, "posted prices."[29] The location variable is just one of the paper's

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[29] The Court accepts the Government's representation that a spot price is a type of posted price, and the Procedure Paper seems to indicate the same.

several indications that Section 206.150's "other relevant factors" were not ignored.

In addition, that the paper interprets Section 206.150's fair market value is evidenced in its distinction between arm's-length and non-arm's-length contract situations. The pertinent portion of the paper reads as follows:

(a) Arm's-length contracts

(From January 1980 to present)

If lessees have a true arm's length contract which establishes an NGLP price, MMS will normally accept the arm's length contract price for royalty purposes unless the gross proceeds received were higher than the contract price. For computation purposes, MMS will accept the greater of the arm's length contract price or gross proceeds.

(From 1973 to January 1980)

If the lessee received a maximum permissible price under the DOE regulations which was less than the contract price, the maximum permissible price becomes the fair market value to use for royalty computation purposes. Otherwise, contract prices or gross proceeds are considered fair market value.

(b) Non-arm's-length contracts/No contract

(From January 1980 to present)

If lessees have a non-arm's-length contract which establishes an NGLP price *and* the lessee can demonstrate that the contract has characteristics similar to arm's-length contracts which represent fair market value, MMS will accept the non-arm's-length contract price for royalty computation purposes. If there are no arm's-length contracts for the same field or area, or the non-arm's-length contract does not represent fair market value, the yardstick value is considered fair market value.

(From 1973 to January 1990)

If the lessee received a maximum permissible price under the DOE regulations which was less than the yardstick price, the maximum permissible price becomes the fair market value to use for royalty computation purposes. Otherwise, yardstick prices or gross proceeds are considered fair market value.

A.R., Vol. III, No. I (emphasis in original).

From beginning to end, the Procedure Paper strives to explain what generally constitutes "fair market value" in certain circumstances; it falls well short of effecting a change in existing law or policy. Based on the manner in which the paper sets valuation ranges, recommends location variables, and accounts for contract-based considerations, the paper truly functions as a "yardstick"; it cannot be said to have the force of law.

The MMS's application of the Procedure Paper in the present case was likewise consistent with the paper's interpretive substance. With respect to each lease to which the Procedure Paper was applied, *see supra* p. 4 n.5, the MMS determined that Phillips and ARCO had failed to value production at fair market value and plainly documented that Section 206.150 was the source of its rulings. *See* A.R., Vol. III, No. 1; Vol. VI, No.'s 1, 2, 3. Based on that determination, the MMS ordered Phillips to recalculate royalties, repeating the Procedure Paper's yardstick guidelines as follows:

For determining the reasonableness of NGLP values based on non-arm's-length transactions, the MMS policy is to apply procedures as set out in its Procedure Paper, as modified by *Conoco Inc., ARCO Oil and Gas Co.*, 110 IBLA 232 (1989). The Procedure Paper now provides that if the NGLP's were disposed under non-arm's-length transactions, including transfers to affiliates, the unit values will

> be compared to the lowest prices published in commercial bulletins. If the value falls below the low price, it is considered unreasonable and unacceptable, and a value using the low price is used. Such values will be used for deriving a manufacturing allowance *and* for calculating royalties.

A.R., Vol. III, No. 1 (emphasis in original). The letter to ARCO likewise stated that, "(f)or determining the reasonableness of NGLP values for non-arm's-length arrangements, the MMS policy is to apply procedures as set out in the NGLP Paper as modified in IBLA decision 87-762, 88-56, decided August 29, 1989." A.R., Vol VI, No. 1 (emphasis added). In considering the leases at issue in each case, the MMS concluded, pursuant to the Procedure Paper, that spot market prices were a reasonable indicator of value and assessed royalties based on the Mont Belvieu, Texas, spot price. *See id.*; A.R., Vol. III, No. 1.

These orders demonstrate that the Procedure Paper was applied as a vehicle to aid assessments of Section 206.150's fair market value; as with the substance of the paper, its application does not effect a change in Section.206.150 or other existing law or policy. Additionally, the fact that the MMS uses the yardstick price ranges recommended in the paper does not make the paper, itself, binding.

Alternatively, the Court considers the Procedure Paper as a procedural rule under the APA.[30] The test in the Fifth

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[30] Under the APA, there is no definition of procedural rules. In the context of its substantial impact test, the Fifth Circuit noted only that "procedure" is the opposite of "substance." *Brown Express, Inc. v. United States*, 807 F.2d at 701. Black's Law Dictionary defines "procedure" as "the mode of proceeding by which a legal right by which a legal right is enforced, as distinguished from the substantive law which gives or defines the right, and which, by means of the proceeding, the court is to administer; the machinery, as distinguished from its product. That which

Circuit for the APA's procedural rule exemption is as follows: The exemption does not apply to any proposed regulation that departs from existing practice and has a "substantial impact" on a "regulated industry, or an important class of members or the products of that industry." *Brown Express, Inc. v. United States*, 607 F.2d at 702 (quoting *Pharmaceutical Mfrs Ass'n v. Finch*, 307 F. Supp. 858, 863 [D. Del. 1970]); *see also United States Dep't of Labor v. Kast Metals Corp.*, 744 F.2d at 1156 (discussing "the twin prongs of departure and substantial impact"). As the Fifth Circuit later explained,

> (i)n essence, the substantial impact test is the primary means by which courts look beyond the label 'procedural' to determine whether a rule is of the type Congress thought appropriate for public participation. An agency rule that modifies substantive rights and interests can only be nominally procedural, and the exemption for such rules of agency procedure cannot apply.

United States Dep't of Labor v. Kast Metals Corp., 744 F.2d at 1153 (citations and footnote omitted).[31]

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regulates the formal steps in an action or other judicial proceeding. . . ." Black's Law Dictionary 1083 (5th ed. 1987). Beyond these basic principles, the Court sees no reason to attempt a rigid distinction between procedural and interpretive rules under the APA. Indeed, in most cases, courts have failed to acknowledge distinctions among the APA Section 553(b) (A) exemptions. *See American Trucking Ass'n, Inc. v. United States*, 688 F.2d at 1351; *supra* note 26.

[31] Although the substantial impact test has been criticized elsewhere, *see, e.g., American Transfer & Storage Co. v. Interstate Commerce Comm'n*, 719 F.2d 1283, 1285 n.4 (5th Cir. 1983) (summarizing criticisms of the test); *United States Dep't of Labor v. Kast Metals Corp.*, 744 F.2d at 1154 n. 19 (rejecting the Ninth Circuit's criticisms of the test and noting that the District of Columbia Circuit, while also criticizing it, employs the test), it remains the standard in the Fifth Circuit.

In the present case, the Court already has held that the Procedure Paper departs not from the existing Section 206.150 practice.[32] *See supra* pp. 36–41. Additionally, there is no evidence that the paper has had a substantial impact on the OCS lease market and OCS lessees; Section 206.150's fair market value has been controlling production valuations all along, and the paper simply clarifies its meaning. In the parlance of the Fifth Circuit, any substantial impact of the paper is "purely derivative." *United States Dep't of Labor v. Kast Metals Corp.*, 744 F.2d at 1156.[33]

The Court concludes that the IBLA did not abuse its discretion, as outlined in the APA, 5 U.S.C.A. § 706(2) (West 1977), when it determined that the Procedure Paper was an interpretive rule not subject to the APA's notice and comment requirements in *Conoco, Inc., and ARCO Oil and Gas Co.*, 110 IBLA 232 (August 29, 1989). The IBLA's determination was not unreasonable, *see Mesa Operating, Ltd. Partnership v. United States Dep't of the Interior*, 931 F.2d at 323, by either of two independent analyses: The paper is interpretive in substance and application, and, in light of its consistent obedience to Section 206.150, the paper, itself, is not the source of any substantial impact on the OCS leasing industry and OCS lessees.

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[32] The Court, of course, understands that this practice necessarily must be shrinking because Section 206.150, per se, has been superseded by the March 1, 1988 production valuation regulations. *See* 30 C.F.R. § 206.153 (1991); *supra* note 24.

[33] Phillips also posits that the MMS's failure to give it notice of "the new standard for computing royalties on NGLP's set forth in the Procedure Paper," Phillips's Brief in Support of its Cross-Motion for Partial Summary Judgment at 52, violated Phillips's substantive and procedural due process rights. This argument fails because it is contingent on the existence of a right to notice and opportunity to comment in some form. Phillips has failed to establish such a right. Any rights that Phillips did have were satisfied when the MMS followed Section 206.150.

The Procedure Paper was not subject to the APA's notice and comment rulemaking requirements. There is no genuine issue of material fact to the contrary.

Section 552[34] *of the APA*

Phillips's next contention is that the Procedure Paper should have been published in the *Federal Register* pursuant to Section 552 of the APA.

Apart from the APA's notice and comment requirements, Section 552 commands that an agency publish in the *Federal Register* "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency." 5 U.S.C.A. § 552 (West 1977). It further provides that, "(e)xcept to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." *Id.* In other words, the Section 552 "requirement for publication attaches only to matters which if not published would adversely affect a member of the public." *United States v. Goodman*, 605 F.2d 870, 887-88 (5th Cir. 1979) (quoting *Hogg v. United States*, 428 F.2d 274, 280 [6th Cir. 1970], *cert. denied*, 401 U.S. 910 [1971]). It is undisputed that Phillips (and ARCO) had no actual notice of the Procedure Paper until it was applied in this case.

The Court already has held that the Procedure Paper is not a substantive rule for Section 553's notice and comment rulemaking purposes, and that holding applies with equal force under Section 552. *See Brecker v. Queens B'Nai B'Rith Housing Dev. Fund Co.*, 798 F.2d 52, 56-57 (2d Cir. 1986); *McKenzie v. Bowen*, 787 F.2d 1216, 1222-23 (8th Cir. 1986).

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[34] Meaning the section number as codified in Title 5 of the United States Code. *See also supra* note 23.

Therefore, the paper does not have the type of effect on the public contemplated by Section 552. Allowing Section 552's requirements to kick in for anything less than a substantive rule would require publication of a potentially limitless list of agency procedures, statements, and actions.

Courts have recognized this limit. In *Chevron Oil Co. v. Andrus*, 588 F.2d 1383 (5th Cir.), *reh'g denied*, 591 F.2d 1343, *cert. denied*, 444 U.S. 879 (1979), for example, a regional manager in the Bureau of Land Management of the DOI accepted Chevron's bids on some oil leases. Later, however, the Deputy Under Secretary of the Interior rejected the bids. *Id.* at 1384. The DOI claimed that it was not bound by the regional manager's acceptance because, in part, of a provision in its internal manual that provided that, "'(a)n officer who delegates or redelegates authority does not divest himself of the power to exercise that authority.'" *Id.* at 1388 (quoting 200 Departmental Manual § 1.3 [1970]). The manual had not been published in the *Federal Register*.

The Fifth Circuit ruled that the Manual's provision was binding and afforded the Under Secretary authority to overrule the regional manager. *Id.* at 1388-89. The court reasoned that,

> it has been held that (Section 552's) 'requirement for publication attaches only to matters which if not published would adversely affect a member of the public,' or which affect the steps a party must take to present a matter to an agency. The provision in the Interior's manual does not relate to the manner in which bids must be submitted. Nor was Chevron adversely affected by its nonpublication. We do not believe that knowing that the Secretary could participate in a decision to reject a bid would have induced Chevron to bid more than it did, and only a higher bid would have influenced the Deputy Under Secretary's decision.

Id. at 1388 n. 8 (quoting *Hogg v. United States*, 428 F.2d at 280) (citation omitted). Similarly, in *Hogg v. United* States, the Sixth Circuit held that, "the Administrative Procedure Act does not require that all internal delegations of authority from the Attorney General must be published in order to be effective." 428 F.2d at 280.

In *McKenzie v. Bowen*, the Secretary of Health and Human Services promulgated a method for calculating retroactive social security disability benefits in a program manual but did not publish the method in the *Federal Register*. 787 F.2d at 1217, 1220. Consequently, the district court enjoined the secretary from calculating benefits pursuant to the program manual method. The Eighth Circuit reversed, ruling that the method need not be published in the *Federal Register* because it was interpretive, rather than substantive.[35] *Id.* at 122-23.

In this case, the impact on royalties felt by Phillips (and ARCO) has been caused by the royalty valuation regulation, itself, Section 206.150, and not by the Procedure Paper's interpretation of it. Furthermore, the Procedure Paper does not change the "steps a party must take to present a matter to an agency." *Chevron Oil Co. v. Andrus*, 588 F.2d at 1388 n.8; *see supra* p. 46.

Though not pertinent for Section 552 purposes, at first blush, it appears that notice of the paper may have influenced Phillips's royalty calculations. If this were true to any meaningful extent, however, Phillips would not be pursuing the present consolidated cases. Phillips's only alternatives to the royalties assessed against it by the MMS are the royalties it actually paid. Those, of course, were considered by the

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[35] As a second rationale for the injunction, the district court reckoned that the retroactive benefits calculation method was promulgated in violation of the APA's notice and comment requirements. The Eighth Circuit rejected this rationale as well. 787 F.2d at 122.

MMS in reaching its determinations. *See* A.R., Vol. III, No. 1; Vol. VI, No.'s 1, 2, 3. There is no indication that the MMS would have calculated the royalties due any differently had it not used the Procedure Paper.

Phillips's Section 552 arguments are without merit.

Retroactive Application of the Procedure Paper

Phillips and ARCO claim that application of the Procedure Paper in this case violated prohibitions against retroactive agency action. This position is contingent on finding that the paper was a substantive rule. The ban on retroactive agency action applies only to new agency rules and agency rules adopted in an adjudicative proceeding. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208-209 (1988); *McDonald v. Watt*, 653 F.2d 1035, 1041-42 (5th Cir. Unit A 1981).

The Procedure Paper is neither such rule, and that which was being applied in the MMS orders at issue here was the already-existing Section 206.150. There was no retroactive application.

Validity of the MMS's Production Valuations

Lastly, the Court considers the remaining valuation issue: The validity of the MMS's production valuations with respect to the leases at issue in this case. Phillips and ARCO's challenges to the valuations rest on their views of the Procedure Paper.

When setting royalties, the Secretary of the Interior, and thus, the MMS, has a great deal of discretion in determining the value of NGLP production. *See Marathon Oil Co. v. United States*, 604 F. Supp. 1375, 1382 (D. Alaska 1985), *aff'd*, 807 F.2d 759 (9th Cir. 1986), *cert. denied*, 480 U.S. 940 (1987). More generally, in the words of the Fifth Circuit, "(w)e defer to an agency's interpretation of its governing statute and regulations, and affirm that interpretation if it has

a reasonable basis in law." *Freightcor Servs., Inc. v. Vitro Packaging, Inc.*, 965 F.2d 1339, 1343 (1992).

Phillips and ARCO have failed to demonstrate that the valuations ordered in this case were unreasonable. There is neither a challenge to the fairness of the Mont Belvieu spot price nor any indication that it is an improper embodiment of the requirements of Section 206.150.

Independently, because the MMS ordered that all of the recalculations at issue be done pursuant to the Procedure Paper, the recalculation orders are on firm footing; all of the MMS's orders were based on the paper and are permissible to the extent that they were so based.[36]

With respect to the MMS's valuations of production in this case, there is no showing of arbitrary or capricious acts and no showing of clear error in judgment. The MMS did not abuse its discretion in applying the Procedure Paper or in arriving at the valuations that it did.

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[36] Phillips also argues that the MMS has not complied with the Paperwork Reduction Act of 1980 ("PRA"), 44 U.S.C.A. §§ 3501-20 (West 1991 & Supp. 1992). The PRA requires that the Director of the Office of Management and Budget approve by issuing a control number the "collection of information" by an agency. *See id.* at § 3507. The MMS's orders requiring recalculation of royalties in this case contain no such numbers. As the Government notes, Phillips's argument amounts to an amended pleading and is, therefore, inappropriate pursuant Rule 15(a), Fed. R. Civ. P. Even were the argument vallowed, it would fail. The PRA "dose not apply to the collection of information. . . during the conduct of. . . an administrative action or investigation involving an agency against specific individuals or entities. . . ." 44 U.S.C.A. § 3518(c)(1) (West 1991). The MMS actions at issue here plainly qualify for this exemption.

VI. Conclusion

Phillips's Cross-Motion for Partial Summary Judgment and ARCO's Motion for Summary Judgment are GRANTED with respect to the statute of limitations issues, and the Government's Motion for Partial Summary Judgment is DENIED with respect to the same issues.

Therefore, the Government is precluded from bringing any causes of action against Phillips and ARCO based on royalty payments on the leases at issue here more than six years after the payments are due.

The Government's Motion for Partial Summary Judgment is GRANTED with respect to the Government's authority to order the royalty recalculations ordered by the MMS in this case. Phillips's Cross-Motion for Partial Summary Judgment and ARCO's Motion for Summary Judgment are DENIED with respect to the same issue.

The Government's Motion for Partial Summary Judgment is GRANTED with respect to the MMS's use of the Procedure Paper in the orders at issue in this case. Phillips's Cross-Motion for Partial Summary Judgment and ARCO's Motion for Summary Judgment are DENIED with respect to the same issue.

Therefore, the Court refuses to set aside the IBLA's decision in *Conoco, Inc., and ARCO Oil and Gas Co.*, 110 IBLA 232 (August 29, 1989).[37] This ruling also means that the Government is not precluded from employing the

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[37] ARCO also requested an allowance from the IBLA for transportation of its NGLP from a processing plant in Louisiana to Mont Belvieu, Texas. *See* ARCO's Memorandum in Support of Motion for Summary Judgment, filed August 16, 1991, at 24–26. The IBLA denied the allowance. Because the MMS's Royalty Management Program has no record that any such transportation took place and because ARCO has made no showing that it did, the Court will not set aside the IBLA's denial of the transportation allowance.

Procedure Paper in its royalty valuations or pursuing causes of action springing from Procedure Paper-based royalty valuations so long as such actions are not based on royalties due and owing for more than six years at the time the complaint is filed.

All other requested relief not expressly addressed in this Memorandum opinion and Order is DENIED.

SO ORDERED.

DATED: September 17, 1992.

/s/ Barefoot Sanders
Barefoot Sanders, Chief Judge
United States District Court
Northern District of Texas

APPENDIX I

United States Department Of The Interior

Mineral Management Service
Dallas Area Compliance Office
6126 E. 32nd Place
Tulsa, Oklahoma, 74135

September 27, 1989

HAND DELIVERED

Phillips Petroleum Company
Attention: Mr. S. M. Haugland
Senior Laws and Regulations Specialist
1090H Plaza Office Building
Bartlesville, Oklahoma 74004

Re: Gas Plants in Which Phillips Petroleum Company (Phillips) Had an Ownership Interest and Processed Gas Produced From Offshore Federal Leases From January 1977 through February 1988

Dear Mr. Haugland:

The United States Department of the Interior has completed audits of royalties paid by Aminoil Inc. (Aminoil) pertaining to offshore Federal leases. Specifically, the Office of Inspector General (OIG) conducted an audit of Aminoil's share of royalties paid on natural gas liquid products (NGLP's) for eight offshore Federal leases processed through the North Terrebonne Gas Processing Plant for the period January 1977 through December 1983. Phillips acquired the leases through the January 1, 1985, merger of Aminoil into Phillips. Aminoil based its NGLP royalty prices on sales to Aminoil Marketing Incorporated, which was 50 percent

owned by Aminoil. Royalties were understated as a result of valuing the NGLP's sold under non-arm's-length arrangements at less than the fair market value for royalty purposes. By letter dated January 28, 1986, Phillips was apprised of the preliminary underpayment of NGLP's royalties and voluntarily paid the additional royalties due through December 31, 1983.

By order dated April 17, 1986, Minerals Management Service (MMS) directed Phillips to review the royalty computations for Aminoil's share of the NGLP's produced at the North Terrebonne Gas Processing Plant for the period January 1984 through the present (February 1988) to assure that the royalty paid subsequent to the OIG audit was calculated using a market value which met the criteria set forth in the MMS Procedure Paper on Natural Gas Liquid Products Valuation (Procedure Paper) (Enclosure 1). Phillips appealed the order to the Director, Minerals Management Service, and subsequently appealed the Director's decision to the Interior Board of Land Appeals (IBLA). As of this date, the IBLA has not rendered a decision.

MMS has conducted a review of Phillips' share of NGLP's processed through the Rollover Gas Plant. The disposition of the NGLP's, except for ethane, were intercompany transfers or sales to affiliates which are considered as non-arm's-length transactions. The values used by Phillips did not consistently represent the fair market value for royalty purposes as outlined in the provisions of the Procedure Paper

The regulations at 30 CFR 206.150 (1987) state in part:

> The value of production shall never be less than the fair market value. The value used in the computation of royalty shall be determined by the Director.

The regulations at 30 CFR 206.152 (1987) state in part:

> (a) When gas is processed for the recovery of constituent products, a royalty established by the

terms of the lease will accrue on the value or amount of:

(1) All residue gas remaining after processing, and

(2) All natural gasoline, butane, propane, or other substances extracted from the gas. A reasonable allowance, determined by the Director and based upon regional plant practices and actual plant costs and other pertinent factors, may be made for the cost of processing and may be deducted from the royalty payment due on said constituent substances. However, the reasonable allowance shall not exceed two-thirds of the value of the substances extracted unless the Director determines that a greater allowance is in the national interest.

(b) Under no circumstances shall the amount of royalty on the residue gas and extracted substances be less than the amount which the Director determines would be payable if the gas had been sold without processing.

Based on the audits discussed herein and Phillips' responses thereto, the MMS considers a systemic or procedural deficiency to exist in the method used to calculate royalty due.

Accordingly, to correct the systemic deficiencies affecting the computation of royalty on production from offshore Federal leases, Phillips is directed to complete the requirements set forth in the following paragraphs:

1. Examine records of plant ownership and identify: (1) all offshore gas plants in which Phillips held an ownership interest from January 1977 through February 1988, and at which natural gas from Phillips' offshore Federal leases was processed; and (2) Phillips-owned offshore Federal leases which are associated with those plants and other plant owners leases for which Phillips pays

royalties. This shall include all interests acquired through mergers with other entities. Phillips is to provide this information by completing Enclosure 2 and returning the information to the MMS Resident Audit Team within 60 days of receipt of this order.

2. Within 90 days of receipt of this order, compute NGLP values for the period January 1977 through February 1988 for each of the gas plants identified pursuant to Item 1. For determining the reasonableness of NGLP values based on non-arm's-length transactions, the MMS policy is to apply procedures as set out in its Procedure Paper as modified by *Conoco Inc., ARCO Oil and Gas Co.*, 110 IBLA 232 (1989). The Procedure Paper now provides that if the NGLP's were disposed under non-arm's-length transactions, including transfers to affiliates, the unit values will be compared to the lowest prices published in commercial bulletins. If the value falls below the low price, it is considered unreasonable and unacceptable, and a value using the low price is used. Such values will be used for deriving a manufacturing allowance *and* for calculating royalties.

Copies of the computations will be provided to the MMS Resident Audit Team. Should the computations result in an increase in NGLP value, compliance with Items 3 and 4 will be required.

3. Within 120 days of receipt of this order, compute annual liquid value and expenses for the period January 1977 through February 1988 for each of the gas plants identified pursuant to Item 1 where the computations result in an increase in NGLP value. This information should be submitted to:

Minerals Management Service
Royalty Valuation and Standards Division
Post Office Box 25165, MS 653
Denver, Colorado 80225

Copies should be provided to the MMS Resident Audit Team. This order does not pertain to the North Terrebonne Natural Gas Processing Plant for the period January 1977 through February 1988. This plant, for the period specified, was addressed separately in the April 17, 1986 order.

4. Within 60 days of receipt of an approved plant-wide manufacturing allowance from MMS, recalculate royalties required by 30 CFR 206.152 and pay any resulting underpayments. Payment must be accompanied by properly completed green Report of Sales and Royalty Remittance (MMS-2014) forms using adjustment reason code 41 or 43, as appropriate. Your payment should be made in accordance with procedures outlined in 30 CFR 218.51. Appropriate late payment charges pursuant to 30 CFR 218.150 will be computed and billed to Phillips upon receipt of payment of additional royalties due. A copy of any payment made and related green MMS-2014 forms filed as a result of this directive should be provided to the MMS Resident Audit Team.

All supporting calculations and source documents are subject to audit by MMS, and therefore should be retained by Phillips until MMS completes its follow-up compliance testing. Our review of the other aspects of volume and values on which royalty is based are not complete. When that portion of our audit is final, we will notify Phillips of any additional exceptions concerning royalty determinations and payments.

Section 109 of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), promulgated in 30 CFR 241.51, authorizes MMS to assess civil penalties for failure or refusal to comply with the requirements of FOGRMA or any statute, regulation, rule, order, lease, or permit. Consequently, your failure to comply with the terms of this order may be considered a violation pursuant to 30 CFR 241.51(a)(3) and could subject you to penalties of up to $5,000 per violation per day for each day such violation continues.

You have the right to appeal in accordance with the provisions of 30 CFR 290. Any appeal taken will be to the Director, Minerals Management Service, and the notice of appeal must be filed with:

Nick L. Kelly, Area Manager
Dallas Area Compliance Office
Minerals Management Service
8303 Elmbrook Drive, Suite 110
Dallas, Texas 75247

within 30 days from the date of receipt of this order.

The notice of appeal must be accompanied by a written showing, as you deem adequate, to justify reversal or modification of this directive. Within the same 30-day period, the appellant will be permitted to file additional statements of reason or written briefs. You may also request, pursuant to 30 CFR 290.4, to present oral argument or evidence to the Director, Minerals Management Service, and such motion should be filed with the Director who may, at his discretion, schedule a hearing at a time and place of his choosing.

With the exception of the time fixed for filing a notice of appeal, the time for filing any document in connection with an appeal may be extended by the Director, Minerals Management Service. Any request for an extension of time must be filed within the 30-day period allowed for filing of the appeal document and must be filed with the same office in which the appeal document was filed.

In accordance with the provisions of 30 CFR 243.2 (1988), compliance with this order will be suspended upon the posting of an adequate surety in the form of a bond or letter of credit pending the outcome of the appeal. Adequate surety will be determined by developing a reasonable estimate of the amount due under the order, subject to the approval of the undersigned. Your proposal of the amount due under the

order must be sent to the address indicated above and must be received within 30 days after receipt of this order. The approved surety amount will include principal plus interest projected one year in advance and will be furnished to you along with instructions for posting surety. Upon request by MMS, the amount of surety will be increased periodically, if necessary, to cover any additional interest that may accrue.

If you have any questions concerning this order, contact Bob Rives at 918-581-6453.

Sincerely,

/s/Roy G. Williams for
Nick L. Kelly
Area Manager
Dallas Area Compliance Officer

3 Enclosures [omitted]

cc: Milton K. Dial, Chief
Royalty Valuation and
Standards Division

APPENDIX J

United States Department Of The Interior

Minerals Management Service
Dallas Area Compliance Office
6126 E. 32nd Place
Tulsa, Oklahoma 74135

September 26, 1989

HAND DELIVERED

Phillips Petroleum Company
Attention: Mr. S. M. Haugland
1090H Plaza Office Building
Bartlesville, Oklahoma 74004

Re: OCS-G 2712, Block A-561 High Island Area

Dear Mr. Haugland:

The Minerals Management Service (MMS) is reviewing royalties paid by Phillips Petroleum Company (Phillips) on oil and gas produced from Federal and Indian leases for the period October 1, 1980 through September 30, 1983. During two sample months, MMS determined royalties were underpaid by $6,950.16 on Federal Lease OCS-G 2712. This lease was acquired by Phillips in its merger with Aminoil Inc. (Aminoil). The underpayment resulted from Phillips' failure to pay royalty on all proceeds for production related costs recovered pursuant to Federal Energy Regulatory Commission (FERC) Orders 94 and 94A. This letter addresses only the specific exceptions outlined below; production volumes and values on all Phillips' properties are subject to further review.

MMS verbally notified Phillips of the royalty underpayment determination on August 7, 1989, and gave Phillips the opportunity to comment and review our calculations. Phillips notified MMS on August 16, 1989, that they were not going to verify our calculations nor comment on the issue.

The gas production sold from this lease is subject to the provisions of FERC Orders 94 and 94A under Section 110 of the Natural Gas Policy Act of 1978. On August 19, 1985, the United States Court of Appeals for the Fifth Circuit in *Texas Eastern Transmission Corporation, et al*, v. *FERC*, Nos. 83-4390 et al, affirmed FERC's decision to make certain production-related expenses recoverable from the effective date of Order 94. This decision confirmed that:

> . . . a price for the first sale of natural gas shall not be considered to exceed the maximum lawful price applicable to the first sale of such natural gas under this subtitle if such first sale price exceeds the maximum lawful price to the extent necessary to recover . . . any costs of compressing, gathering, processing, treating, liquifying, or transporting such natural gas, or other similar costs, borne by the seller and allowed for, by rule or order, by the Commission.

In addition to the Court's decision, MMS has determined that:

> Any monies received, or which could have been received, by the seller (lessee), for production-related costs, are a part of the gross proceeds upon which royalties are due.

Regulations at 30 CFR 206.150 (1985), entitled "Value basis for computing royalties", state in part:

> Under no circumstances shall the value of production be less than the gross proceeds. . . .

Consequently, royalties should have been paid on all proceeds for production related costs recovered pursuant to FERC

Orders 94 and 94A. The United States District Court for the Western District of Louisiana recently upheld an MMS order to pay royalty on reimbursement for production-related costs under FERC Order 94. *Mesa v. DOI*, Civ. No. 88-0414 LC (W. D. La., filed Aug. 23, 1989).

Our review shows that during May and June 1983, royalties were underpaid on Lease OCS-G 2712 due to royalties being paid on a gathering allowance of $.00408 per Mcf rather than the $.07 collected for each MMBtu sold (see Enclosure 1). Further review by MMS indicates that royalties were underpaid on Lease OCS-G 1025 due to the same issue. The error identified above appears to be systemic in nature. Therefore, within 30 days of receipt of this order, Phillips is directed to:

1. Review royalty calculations for all leases acquired by Phillips in its merger with Aminoil to determine if royalties were properly paid on all proceeds collected for production related costs. The two leases specifically discussed herein are leases acquired via the merger with Aminoil in 1985.

2. Recalculate royalties for all months from July 25, 1980, to the present, in instances where payments were not based on total proceeds received pursuant to FERC Orders 94 and 94A.

3. Pay all additional royalties due within 30 days of receipt of this letter. Payment *must* be accompanied by a properly completed *green* Report of Sales and Royalty Remittance (MMS-2014) form using adjustment reason code 41 or 43, as appropriate. Your payment should be made in accordance with procedures outlined in 30 CFR 218.51. Appropriate late payment charges pursuant to 30 CFR 218.150 will be computed and billed to Phillips upon receipt of payment of additional royalties due.

4. Provide MMS with a listing of all leases reviewed pursuant to this order.

A copy of the schedule of unpaid royalties in the format shown in Enclosure 2 along with copies of the green MMS-2014 forms, should be provided to this office within 30 days of your receipt of this letter. All documentation supporting your compliance with this order should be retained until MMS completes its follow-up compliance testing. Thereafter, on the subject lease and all other leases identified, Phillips should continue to value production for royalty purposes in accordance with regulations and guidelines discussed in this order. If in the future, we determine that the required accounting has not been performed and the future royalty payments do not comply with this order, the violation may be considered willful.

Section 109 of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), and regulations promulgated in 30 CFR 241.51, authorize MMS to assess civil penalties for failure or refusal to comply with the requirements of FOGRMA or any statute, regulation, rule, order, lease, or permit. Consequently, your failure to comply with the terms of this order may be considered a violation pursuant to 30 CFR 241.51 and could subject you to penalties of up to $5,000 per violation per day for each day such violation continues and up to $10,000 per violation each day if the violation is considered to be willful.

You have the right to appeal in accordance with the provisions of 30 CFR 290. Any appeal taken will be to the Director, Minerals Management Service, and the notice of appeal must be filed with:

Nick L. Kelly, Area Manager
Dallas Area Compliance Office
Minerals Management Service
8303 Elmbrook Drive, Suite 110
Dallas, Texas 75247

within 30 days from the date of receipt of this letter.

The notice of appeal must be accompanied by a written showing, as you deem adequate, to justify reversal or modification of this directive. Within the same 30-day period, the appellant will be permitted to file additional statements of reason or written briefs. You may also request, pursuant to 30 CFR 290.4, to present oral argument or evidence to the Director, Minerals Management Service, and such motion should be filed with the Director who may, at his discretion, schedule a hearing at a time and place of his choosing.

With the exception of the time fixed for filing a notice of appeal, the time for filing any document in connection with an appeal may be extended by the Director, Minerals Management Service. Any request for an extension of time must be filed within the 30-day period allowed for filing of the appeal document and must be filed with the same office in which the appeal document was filed.

In accordance with the provisions of 30 CFR 243.2, compliance with this order will be suspended upon the posting of an adequate surety in the form of a bond or letter of credit pending the outcome of the appeal. Adequate surety will be determined by developing a reasonable estimate of the amount due under the order, subject to the approval of the undersigned. Your proposal of the amount due under the order must be sent to the address indicated above and must be received within 30 days after receipt of this letter. The approved surety amount will include principal plus interest projected one year in advance and will be furnished to you along with instructions for posting surety.

If you have any questions, contact Bob Rives at 918-581-6453.

Sincerely,

/s/ Nick L. Kelly
Nick L. Kelly
Area Manager
Dallas Area Compliance Office

2 Enclosures [omitted]

APPENDIX K

United States Department Of The Interior

Minerals Management Service
Dallas Area Compliance Office
6126 E. 32nd Place
Tulsa, Oklahoma 74135

CERTIFIED MAIL--
RETURN RECEIPT REQUESTED

June 12, 1989

Phillips Petroleum Company
Attention: Ms. Jill E. Coble
1020 Plaza Office Building
Bartlesville, Oklahoma 74004

Gentlemen:

Re: Late Payment Charges, Federal Leases 054-002301-0 and 054-002302-0

The Minerals Management Service (MMS) notified Phillips Petroleum Company (Phillips) on March 21, 1989, that a review of royalty payments which were tendered for Federal leases and which were attributable to the provisions of Federal Energy Regulatory Commission (FERC) Orders 94 and 94A, Section 110 of the Natural Gas Policy Act of 1978, were found to be underpaid by $1,400.75. MMS's calculations pertained to the test months of June and July 1983. In response, Phillips recalculated royalties due for the period February 1982 through January 1984; and on March 31, 1989, remitted $59,951.19 in unpaid royalty. As a result of the late royalty payment, Phillips is assessed late payment charges totaling $24,074.72.

The regulations at 30 CFR 218.150 provide that failure to make timely or proper payment of any monies due pursuant

to leases subject to these regulations will result in the collection by MMS of the full amount past due plus a late payment charge. In accordance with 30 CFR 218.54, interest is assessed on all unpaid or underpaid amounts from the date the payments are due until the date payments are received in the appropriate MMS accounting office. Interest is charged only on the payments not received and only for the number of days the payment is late. Effective December 13, 1979, through May 31, 1982, the interest rate to be applied is calculated as the average of the highest rate for commercial and finance company paper of maturities of 180 days or less obtaining on each of the days incurred within the period for which the late charge is due. From June 1, 1982, through January 11, 1983, the percentage assessment rate to be applied is the rate prescribed by the Department of the Treasury as the "Treasury Current Value of Funds Rate" and is published in the Treasury Fiscal Requirements Manual Bulletins. Beginning January 12, 1983, pursuant to Public Law 97-451, Section 111, the rate applied is in accordance with Section 6621 of the Internal Revenue Code of 1954.

Accordingly, Phillips is assessed late payment charges of $21,512.33 for Lease 054-002301-0 and $2,562.39 for Lease 054-002302-0 from the date the payment was due through March 30, 1989. Computations of the applicable late payment charges are enclosed.

Your payment should be made in accordance with procedures outlined in 30 CFR 218.51. Payment is due by the date prescribed on the Bill for Collection and must be accompanied by a copy of the billing.

Section 109 of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), promulgated in 30 CFR 241.51, authorizes MMS to assess civil penalties for failure or refusal to comply with the requirements of FOGRMA or any statute, regulation, rule, order or permit. Consequently, your failure to comply with the terms of this order may be considered a

violation pursuant to 30 CFR 241.51(a) (3) and could subject you to penalties of up to $5,000 per violation per day.

You have the right to appeal in accordance with the provisions of 30 CFR 290. Any appeal taken will be to the Director, Minerals Management Service, and the notice of appeal must be filed with:

Nick L. Kelly, Area Manager
Dallas Area Compliance Office
Minerals Management Service
8303 Elmbrook Drive, Suite 110
Dallas, Texas 75247

within 30 days from the date of receipt of this letter.

The notice of appeal must be accompanied by a written showing, as you deem adequate, to justify reversal or modification of this directive. Within the same 30-day period, the appellant will be permitted to file additional statements of reason or written briefs. You may also request, pursuant to 30 CFR 290.4, to present oral argument or evidence to the Director, Minerals Management Service, and such motion should be filed with the Director who may, at his discretion, schedule a hearing at a time and place of his choosing.

With the exception of the time fixed for filing a notice of appeal, the time for filing any document in connection with an appeal may be extended by the Director, Minerals Management Service. Any request for an extension of time must be filed within the 30-day period allowed for filing of the appeal document and must be filed with the same office in which the appeal document was filed.

In accordance with the provisions of 30 CFR 243.2, compliance with this order shall not be suspended by reason of an appeal having been taken. An option is available to post surety in lieu of paying, pending the outcome of the appeal. The completed bond or letter of credit must be sent

to Chief, Payor Accounting Branch, Minerals Management Service, Royalty Management Program, Denver Federal Center, Building 85, Room A-212, Denver, Colorado 80225 and *must be received by the invoice due date*. The surety must be in the amount of $26,723.00 which includes the principal plus interest that will accrue through June 1990. Upon request by MMS, the amount of the surety will be increased periodically, if necessary, to cover any additional interest that may accrue. Enclosed are instructions for posting surety.

If you have any questions, contact Bob Rives at 918-581-6453.

Sincerely,

/s/ Roy G. Williams for
Nick L. Kelly
Area Manager
Dallas Area Compliance Office

5 Enclosures [omitted]

APPENDIX L

United States Department Of The Interior

Minerals Management Service
Dallas Area Compliance Office
6126 E. 32nd Place
Tulsa, Oklahoma 74135

June 5, 1989

HAND DELIVERED

Phillips Petroleum Company
Attention: Ms. Jill Coble
1020 Plaza Office Building
Bartlesville, Oklahoma 74004

Gentlemen:

The Minerals Management Service (MMS) is reviewing royalties paid by Phillips Petroleum Company (Phillips) on oil and gas produced from Federal and Indian leases for the period October 1, 1980 through September 30, 1983. During two sample months, MMS determined royalties were underpaid by $1,400.75 on Federal Lease OCS-G 2301. The underpayment resulted from the failure to pay royalty on all proceeds for production related costs recovered pursuant to Federal Energy Regulatory Commission (FERC) Orders 94 and 94A. This letter addresses only the specific exceptions outlined below; production volumes and values on all Phillips properties are subject to further review.

The lease is subject to the provisions of the FERC Orders 94 and 94A under Section 110 of the Natural Gas Policy Act of 1978. On August 19, 1985, the United States Court of Appeals for the Fifth Circuit in *Texas Eastern Transmission Corporation, et al,* v. *FERC*, Nos. 83-4390 et al, affirmed FERC's decision to make product-related allowances recoverable from the effective date of Order 94. This decision confirmed that:

> . . . a price for the first sale of natural gas shall not be considered to exceed the maximum lawful price applicable to the first sale of such natural gas under this subtitle if such first sale price exceeds the maximum lawful price to the extent necessary to recover . . . any costs of compressing, gathering, processing, treating, liquifying, or transporting such natural gas, or other similar costs, borne by the seller and allowed for, by rule or order, by the Commission.

In addition to the Court's decision, MMS has determined that:

> Any monies received, or which could have been received, by the seller (lessee), for production-related costs, are a part of the gross proceeds upon which royalties are due.

Regulations at 30 CFR 206.150, entitled "Value basis for computing royalties", state in part:

> Under no circumstances shall the value of production be less than the gross proceeds. . . .

Our review shows that during June and July 1983, royalties were underpaid due to Phillips paying royalties on gathering allowances of $.0051 per Mcf rather than the $.05 collected per MMBtu of gas produced. (See Enclosure 1.) MMS notified Phillips of the underpayment on Lease OCS-G 2301 by letter dated March 21, 1989. In response, Phillips paid royalty totaling $53,570.17 for Lease OCS-G 2301 and $6,381.02 for Lease OCS-G 2302 for the period February 1982 through January 1984. Further review by MMS also indicates that royalties were underpaid on Lease OCS 0301 due to the same issue. Therefore, within 30 days of receipt of this order, Phillips is directed to:

1. Review royalty calculations for all leases acquired by Phillips in its merger with General American Oil Company of Texas (GAO) to determine if royalties were

properly paid on all proceeds collected for production related costs. The three leases specifically discussed herein are leases acquired via the merger with GAO in 1983.

2. Recalculate royalties for all months from July 25, 1980 to the present, in instances where payments were not based on total proceeds received pursuant to FERC Orders 94 and 94A.

3. Submit any additional payment due in accordance with procedures outlined in 30 CFR 218.51 and report the payment to the Fiscal Accounting Division on *green* MMS-2014 forms (enclosed) using adjustment reason code 41 or 43, whichever is appropriate.

4. Provide MMS with a listing of all leases reviewed pursuant to this order.

A copy of the schedule of unpaid royalties in the format shown in Enclosure 2 along with copies of the green MMS-2014 forms, should be provided to this office within 30 days of your receipt of this letter. All documentation supporting your compliance with this order should be retained until MMS completes its follow-up compliance testing. Appropriate late payment charges pursuant to 30 CFR 218.150 will be computed and billed to Phillips upon receipt of additional royalties due. Thereafter, on the subject leases and all other leases identified, Phillips should continue to value production for royalty purposes in accordance with regulations and guidelines discussed in this order.

Section 109 of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), promulgated in 30 CFR 241.51, authorizes MMS to assess civil penalties for failure or refusal to comply with the requirements of FOGRMA or any statute, regulation, rule, order or permit. Consequently, your failure to comply with the terms of this order may be considered a

violation pursuant to 30 CFR 241.51(a) (3) and could subject you to penalties of up to $5,000 per violation per day.

You have the right to appeal in accordance with the provisions of 30 CFR 290. Any appeal taken will be to the Director, Minerals Management Service, and the notice of appeal must be filed with:

Nick L. Kelly, Area Manager
Dallas Area Compliance Office
Minerals Management Service
8303 Elmbrook Drive, Suite 110
Dallas, Texas 75247

within 30 days from the date of receipt of this letter.

The notice of appeal must be accompanied by a written showing, as you deem adequate, to justify reversal or modification of this directive. Within the same 30-day period, the appellant will be permitted to file additional statements of reason or written briefs. You may also request, pursuant to 30 CFR 290.4, to present oral argument or evidence to the Director, Minerals Management Service, and such motion should be filed with the Director who may, at his discretion, schedule a hearing at a time and place of his choosing.

With the exception of the time fixed for filing a notice of appeal, the time for filing any document in connection with an appeal may be extended by the Director, Minerals Management Service. Any request for an extension of time must be filed within the 30-day period allowed for filing of the appeal document and must be filed with the same office in which the appeal document was filed.

In accordance with the provisions of 30 CFR 243.2, compliance with this letter shall not be suspended by reason of an appeal having been taken. An option is available to post a bond as surety in lieu of paying, pending the outcome of the appeal. A request for stay of payment pending appeal

must be made within 30 days from the receipt of this letter and sent to the address indicated above.

If you have any questions, contact Bob Rives at 918-581-6453.

Sincerely,

/s/ Nick L. Kelly
Nick L. Kelly
Area Manager
Dallas Area Compliance Office

3 Enclosures [omitted]

APPENDIX M

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1377

PHILLIPS PETROLEUM COMPANY,

Plaintiff-Appellant,

v.

GARY JOHNSON, Area Manager,
Dallas Area Compliance Office,
Minerals Management Service, et al.,

Defendants-Appellees.

ATLANTIC RICHFIELD COMPANY,

Plaintiff-Appellant,

v.

BRUCE BABBITT,
Secretary of Department of Interior, et al.,

Defendants-Appellees.

PHILLIPS PETROLEUM COMPANY,

Plaintiff-Appellant,

v.

GARY JOHNSON, Area Manager,
Dallas Area Compliance Office,
Minerals Management Service, et al.,

Defendants-Appellees.

PHILLIPS PETROLEUM COMPANY,

Plaintiff-Appellant,

v.

GARY JOHNSON, Area Manager,
Dallas Area Compliance Office,
Minerals Management Service, et al.,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 9/7/94, 5 Cir., 1994, F.3d____)

(November 1, 1994)

Before SMITH and BARKSDALE, Circuit Judges and WALTER, District Judge[1].

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Judges who are in regular active service not having voted in favor, (FRAP and Local

---

[1] District Judge of the Western District of Louisiana, sitting by designation.

Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Jerry E. Smith
United States Circuit Judge

Judge Duhé did not participate in the consideration of the suggestion for rehearing en banc.

(2)

FILED
MAR 31 1995

No. 94-1287

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

PHILLIPS PETROLEUM COMPANY,
Petitioner,
v.
GARY JOHNSON, AREA MANAGER,
DALLAS AREA COMPLIANCE OFFICE,
MINERALS MANAGEMENT SERVICE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF AMICUS CURIAE AMERICAN PETROLEUM INSTITUTE IN SUPPORT OF PETITIONER

G.W. FRICK
DAVID T. DEAL
AMERICAN PETROLEUM INSTITUTE
1220 L Street, N.W.
Washington, D.C. 20005

THOMAS J. EASTMENT
Counsel of Record
KELLY A. RILEY
BAKER & BOTTS, L.L.P.
The Warner
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2400
(202) 639-7700

Counsel for Amicus Curiae
American Petroleum Institute

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1287

PHILLIPS PETROLEUM COMPANY,
Petitioner,

v.

GARY JOHNSON, AREA MANAGER,
DALLAS AREA COMPLIANCE OFFICE,
MINERALS MANAGEMENT SERVICE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF AMICUS CURIAE AMERICAN PETROLEUM INSTITUTE IN SUPPORT OF PETITIONER

The American Petroleum Institute ("API") respectfully files this brief of *amicus curiae* in support of the Petition for Writ of Certiorari filed by Phillips Petroleum Company ("Phillips Petition"). All parties to this action have consented to the API's filing of an *amicus* brief. Their letters of consent have been filed with the Clerk of the Court concurrently with this brief.

STATEMENT OF INTEREST

API is a trade association located in the District of Columbia, representing the interests of its membership on issues of national import before federal government agen-

cies, Congress, and the courts. API has over 300 members from all segments of the oil and gas industry, including many integrated and independent oil and gas producers. These producer-members hold interests in thousands of oil and gas leases on federal onshore lands and submerged lands in the Outer Continental Shelf ("OCS"), and have a critical interest in the resolution of the issue presented in the Phillips Petition.

The issue raised in the Phillips Petition pertains to the applicability of the six-year limitations period in 28 U.S.C. § 2415(a) for actions brought by the United States for monies allegedly due under contracts with the federal government. This question is of great importance to the members of API by reason of their interests in federal oil and gas leases, under which these companies pay royalties to the federal government.

The Fifth Circuit's decision below, which holds that 28 U.S.C. § 2415(a) does not apply to actions brought by the United States for royalties allegedly due under federal oil and gas leases, directly conflicts with decisions of the Tenth Circuit. Insofar as the Fifth Circuit's decision leaves API's members exposed to suits for additional royalties in perpetuity, API has a substantial interest in the issue presented by Phillips.

SUMMARY OF ARGUMENT

API strongly supports the Phillips Petition. The importance of the issue presented transcends the interests of the parties to the proceedings below. Because the issue is of fundamental importance to the entire oil and gas industry, as well as to others having contractual relationships with the federal government, API urges the Court to grant a writ of certiorari.

The case addresses the scope of the general six-year period of limitations applicable to contract actions brought by the United States. 28 U.S.C. § 2415(a). Specifically, the question presented is whether the Fifth

Circuit erred in holding that the statutory provision bars neither judicial nor administrative actions brought by the United States for monies allegedly due under contracts. By eliminating the applicability of any limitations period to such actions, the Fifth Circuit's decision upsets the level playing field Congress created in contract matters between the federal government and private parties. In Section 2415(a), Congress intended to provide the federal government with the same six-year period in which to bring contract actions for money as provided to private parties to bring such actions against the federal government pursuant to 28 U.S.C. § 2401(a). *See, e.g., Crown Coat Front Co. v. United States*, 386 U.S. 503, 521 n.14 (1967).

The Fifth Circuit's decision exposes lessees in perpetuity to actions based on alleged royalty underpayments with respect to the over $3 billion of royalty payments made each year under the approximately 25,000 federal and Indian oil and gas leases currently extant. *See* U.S. Department of the Interior, Minerals Management Service, *Mineral Revenues 1993: Report on Receipts from Federal and Indian Leases* 13, 97 ("Mineral Revenues 1993"). Moreover, inasmuch as 28 U.S.C. § 2415(a) is generally applicable to contract actions brought by the United States, the impact of the decision will necessarily extend well beyond oil and gas lease disputes.

The impact of the decision is aggravated by the conflict between the Fifth Circuit's decision and recent decisions of the Tenth Circuit and other Courts of Appeals. *See Phillips Petroleum Co. v. Lujan*, 4 F.3d 858 (10th Cir. 1993) ("*Phillips I*"); *Mesa Operating Ltd. Partnership v. Department of the Interior*, 17 F.3d 1288 (10th Cir. 1994). In contrast with the Fifth Circuit's decision, the Tenth Circuit held in *Phillips I* and *Mesa* that 28 U.S.C. § 2415(a) establishes a limitations period on actions brought by the United States for monies purportedly due

under oil and gas leases. The Fifth Circuit's view also conflicts with numerous decisions of other Courts of Appeals that have applied Section 2415(a) to actions by the United States to recover money due under contracts other than oil and gas leases. As a result, the applicability of the six-year limitations period is now a matter of whether the United States brings an action for allegedly owed royalties in the Fifth Circuit or another Court of Appeals. Until reconciled, the conflict will result in substantial unfairness and uncertainty with respect to such actions.

In API's view, the plain terms of 28 U.S.C. § 2415(a) specify that the six-year limitations period applies to actions for monies due under a contract. In the context of actions in contract, the term "money damages" is widely understood to encompass monies due under a contract. The contrary view adopted by the Fifth Circuit improperly equates such an action with one for specific performance, and in so doing essentially eviscerates the statute with respect to a large and critical category of contract actions for the recovery of money.

For these reasons, the Court should grant a writ of certiorari to resolve the conflict between the decisions of the Fifth Circuit and the Tenth Circuit and other Courts of Appeals, and to ensure that the general six-year statute of limitations for actions brought by the United States under contract is applied as intended by Congress.

REASONS FOR GRANTING THE PETITION

I. THE ISSUE PRESENTED IS OF SUBSTANTIAL IMPORTANCE AND SHOULD BE RESOLVED BY THE COURT.

The issue presented in the Phillips Petition is of substantial importance not only to federal oil and gas lessees but also to all those entering into contracts with the federal government. The statute interpreted in the Fifth Circuit's decision sets forth the general limitations period

governing contract actions for money damages brought by the United States. The Fifth Circuit's decision, however, eviscerates the statute by excluding from its reach all actions for monies allegedly due to the federal government under contract.

1. The effective elimination of a general limitations period for actions for monies due under a contract with the federal government has a substantial and detrimental impact on parties contracting with the federal government. API's members, which include many integrated and independent oil and gas producers, are among those impacted by the Fifth Circuit's decision. API's members and other oil and gas producers are currently lessees under over 25,000 federal and Indian oil and gas leases affecting both onshore lands and submerged lands in the Outer Continental Shelf. Mineral Revenues 1993, *supra*, at 97. Under these leases, over $3 billion in royalties was paid to the federal government in calendar year 1993. *Id.* at 13. The effect of the Fifth Circuit's decision is to leave open in perpetuity these producer-lessees to actions brought by the United States based on contractual claims that royalties were underpaid. Stale claims, which can be brought an unlimited number of years after royalties are allegedly due, can generate sizeable additional claims for interest that can cause a substantial and unanticipated impact on cash flow. *See* 30 U.S.C. § 1721(a) (royalty interest). Such unanticipated liabilities are particularly disruptive to smaller companies.

2. The Fifth Circuit's position on the reach of 28 U.S.C. § 2415(a) is of paramount importance to the oil and gas industry. Many oil and gas producers have their principal places of business within the Fifth Circuit. In addition, well over 90 percent of the oil and gas produced from federal offshore leases in 1993 was produced off the coast of states within the jurisdiction of the Fifth Circuit. Mineral Revenues 1993, *supra*, at 33-37. And offshore production accounted for about 79 percent of

the oil and gas royalty revenue from all federal and Indian lessees. *Id.* at 13. Accordingly, a substantial portion of actions brought by the United States for underpaid royalties will likely arise in the district courts within the Fifth Circuit.

3. The conflict between the Fifth Circuit and the Tenth Circuit will cause considerable confusion and unfairness. The Tenth Circuit comprises states in which a substantial majority of federal onshore oil and gas leases are located. Mineral Revenues 1993, *supra*, at 96. Given the contrasting views of the Fifth and Tenth Circuits, the United States will likely select a forum for its contract actions against lessees in the Fifth Circuit whenever possible to avoid the Tenth Circuit. Of course, venue requirements may force the United States to bring some cases to the Tenth Circuit, or lessees may attempt to bring declaratory judgment actions within the Tenth Circuit, as the lessee did in *Phillips I*. The result will be intolerable inconsistency. When before a court in the Fifth Circuit, lessees will be exposed to claims for underpaid royalties in perpetuity. When before a court in the Tenth Circuit, 28 U.S.C. § 2415(a) will interpose the protection of a six-year limitations period. The Supreme Court should resolve this conflict to minimize the incentive for forum shopping and to ensure that all federal lessees, wherever located, are provided equal protection under applicable statutes.

4. Finally, resolution of the conflict between the Fifth and Tenth Circuits is of pressing importance given the rapidly changing regulatory environment confronting the gas industry. Neither the federal government nor the gas industry is served by the absence of a limitations period on claims for additional royalties during this period of dramatic industry change.

a. There is no question that the existence of an applicable limitations period serves to provide a significant

incentive to the federal government to audit lessee royalty payments and to bring actions for alleged underpayments in a prompt and timely manner. Indeed, prior to its change of position in the case below before the Fifth Circuit, the United States Department of the Interior ("DOI") took the position that 28 U.S.C. § 2415(a) applied to its claims for additional royalties. *See, e.g., Phillips I*, 4 F.3d at 860 ("The [Secretary of the Interior] agree[s] that 28 U.S.C. § 2415(a) is the applicable statute for determining when the government must commence its action to collect the royalty underpayment."). *See also* DOI Memorandum, dated May 10, 1974, App., *infra*, at 2a ("It is clear that the statute applies to suits by the government to collect rents and royalties."). This led the Department to caution its auditors to audit lessee royalty payments promptly so as to avoid the statutory bar to claims. *See* App., *infra*, at 7a-8a. Although the Department adopted an unjustifiably liberal view of when the limitations period would run, *see, e.g., Phillips I*, 4 F.3d at 860, the existence of some limitations period provided an incentive to the Department to undertake prompt action to identify royalty underpayments and to seek redress. The effect of the Fifth Circuit's decision is to reduce the agency's incentive to undertake promptly its actions for royalty underpayments.

b. The likely impact of the Fifth Circuit's decision on the promptness of agency action is particularly counterproductive given the rapid changes occurring in the gas industry. The federal government's audit and enforcement activities provide important guidance to lessees as to the government's position on emerging issues and, concomitantly, enable the government to adapt its policies to industry changes. For this reason, the rapidly changing gas industry makes it essential for the federal government to audit on a timely basis and to assert promptly its claims for additional royalties.

Prior to 1978, producers' gas prices were regulated by the Federal Power Commission under the Natural Gas Act. 15 U.S.C. §§ 717 *et seq.* During this era, the vast bulk of gas sold in interstate commerce was sold by producers to pipelines for sale to end-users or for resale to local distribution companies. This structure continued for several years under the Natural Gas Policy Act of 1978 ("NGPA"), which established separate price ceilings for numerous categories of gas.[1] During this era, the substantial majority of gas was sold at the wellhead for the applicable ceiling price. Inasmuch as federal royalties are tied to the value of gas produced and sold, the amount of royalty due was largely a function of the applicable regulatory ceilings.

But in the NGPA were planted the seeds of rapid and radical change. The NGPA removed ceiling prices on many categories of gas on a specified schedule. 15 U.S.C. § 3331 (repealed 1989) (West Supp. 1994). This process, which left regulated essentially only "old" gas that had been previously regulated under the Natural Gas Act, was brought full circle in the Decontrol Act of 1989, which eliminated all remaining price ceilings as of January 1, 1993. *See* 15 U.S.C. §§ 3311-3319, 3331 (repealed 1989) (West Supp. 1994).

The deregulation of wellhead gas prices forced rapid changes in the overall regulatory environment for the gas industry. In order to spread the competitive benefits of deregulation, the Federal Energy Regulatory Commission embarked on an effort to provide gas purchasers greater access to alternative suppliers. In its Order No. 436, issued on October 9, 1985, the Commission instituted a transportation program that was designed to encourage interstate pipelines to provide transportation

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[1] *See* 15 U.S.C. §§ 3311-3319, *repealed by* Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, § 2(b), 103 Stat. 158 ("Decontrol Act of 1989").

services on an open access basis.[2] Subsequently, in Order No. 636, issued on April 8, 1992, the Commission went further and required interstate pipelines to sever the tie between their sales and transportation services.[3]

The result is a complete change in the industry structure. No longer is gas generally sold in interstate commerce at the wellhead at regulated prices, which generally provided the basis for royalty payments. New innovative gas transactions have replaced the relatively simple producer/interstate pipeline gas sales contracts, completely new gas marketing entities have arisen as resellers between the producer and downstream purchasers, and the industry engages in futures trading and other innovative activities reflective of a free and competitive market. These changes, which dramatically complicate the determination of the value received for gas by a producer/lessee, in turn affect the amount of royalties owed to the federal government.

It is API's view that in such a rapidly changing environment, neither the federal government nor industry is served by allowing the federal government an unlimited time in which to bring claims for additional royalties. The resources of both the government and industry would be now far better deployed in working on the issues raised by the new complex gas marketplace, rather than litigating today the regulatory problems of a past decade.

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[2] For a discussion of the changes brought about in the gas industry by Order No. 436, see *Associated Gas Distributors v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied sub nom. Interstate Natural Gas Ass'n of Am. v. FERC*, 485 U.S. 1006 (1988).

[3] *See* Order No. 636, III F.E.R.C. Stats. & Regs. [Regs. Preambles] ¶ 30,939 (1992), *reh'g denied in part and granted in part*, Order No. 636-A, III F.E.R.C. Stats. & Regs. [Regs. Preambles] ¶ 30,950 (1992), *reh'g denied*, Order No. 636-B, 61 F.E.R.C. ¶ 61,272 (1992), *reh'g denied*, 62 F.E.R.C. ¶ 61,007 (1993), *appeal redocketed sub nom. United Distribution Cos. v. FERC*, No. 92-1485 (D.C. Cir. Feb. 8, 1995).

Prompt prosecution of claims will yield the federal government the royalty that it is due on a more timely basis and provide industry with a more timely understanding of the federal government's position on issues affecting the amount of royalty due.

For these reasons, the Court should grant a writ of certiorari because the resolution of the issue presented is of substantial and continuing importance to a large number of oil and gas lessees as well as to other government contractors.

II. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

1. The Fifth Circuit's decision directly conflicts with two decisions by the Tenth Circuit on the issue of whether the six-year statute of limitations in 28 U.S.C. § 2415(a) applies to actions brought by the Minerals Management Service ("MMS") to collect allegedly underpaid royalties on mineral leases. The Fifth Circuit held that Section 2415(a) does not apply to actions brought by the MMS to collect additional royalties. Phillips App. at 3a-4a. The Tenth Circuit, however, has found in two separate decisions that Section 2415(a) does apply to such actions. *Mesa*, 17 F.3d at 1291; *Phillips I*, 4 F.3d at 860 n.1. Because the Fifth and Tenth Circuits, in which many producers have their principal places of business and where a substantial majority of federal oil and gas leases are located, are the primary forums for suits involving federal oil and gas leases, prompt resolution of the conflict between these Courts of Appeals is necessary.

a. There were two bases underlying the Fifth Circuit's decision that Section 2415(a) does not apply in this case. First, the Fifth Circuit determined that the term "action for money damages" in Section 2415(a) "refers to a suit in court." Phillips App. at 3a. Making no

explicit reference to the agency's counterclaim, the Fifth Circuit held that Section 2415(a) did not apply to the administrative orders to pay issued by the MMS, because the agency's orders "do not involve the filing of a complaint." *Id.* Second, the Fifth Circuit held that Section 2415(a) did not apply because the MMS orders did not seek "money damages." *Id.* at 4a. Relying on this Court's decision in *Bowen v. Massachusetts*, 487 U.S. 879 (1988), the Fifth Circuit narrowly construed the phrase "money damages" in Section 2415(a) as referring only to a "sum of money used as compensatory relief." Phillips App. at 4a. The court found that the relief requested in the MMS orders was not compensatory, because the orders only sought money due under a contract with the government. *Id.*

Although the Fifth Circuit's decision states that "[a]gency orders are . . . not barred by the limitations period of § 2415," its holding also exempts judicial actions by the government from the time limitations in Section 2415(a). Under the Fifth Circuit's holding if the MMS files a complaint or counterclaim in court to collect underpaid royalties, Section 2415(a) would not apply because the action would not constitute an action for "money damages." Indeed, notwithstanding Section 2415(a)'s time limitation, the Fifth Circuit affirmed the district court's decision to permit the MMS to file a counterclaim against Phillips to enforce its administrative orders to collect allegedly underpaid royalties. Phillips App. at 4a, 9a.

b. Directly contrary to the Fifth Circuit's decision, the Tenth Circuit has found that Section 2415(a) applies to actions brought by the MMS for royalty underpayments. *Mesa*, 17 F.3d at 1291; *Phillips I*, 4 F.3d at 860 n.1. In *Mesa*, the Tenth Circuit determined that the statute of limitations in Section 2415(a) was a valid defense to the

federal government's action to collect underpaid royalties pursuant to a mineral lease. 17 F.3d at 1291. Although the court declined to apply the statute, because it found that the lessee's failure to raise the defense in a timely manner constituted a waiver, the court's analysis makes clear that in order to collect underpaid royalties, the government must bring an action before the six-year statute has run. *Id.* at 1291-92.

In *Phillips I*, the Tenth Circuit held that Section 2415(a) is the "controlling statute of limitations" for determining when the government must commence actions for collection of alleged royalty underpayments. 4 F.3d at 860 n.1. At issue in that case was the date from which the six-year limitations period began to run, and whether such period was tolled until the government completed its audit of the lessee. *Id.* at 860-62. The necessary predicate for the Tenth Circuit's resolution of those issues was the court's determination that Section 2415(a) imposed a time limitation on the federal government to commence an action to collect underpaid royalties. Significantly, the *Phillips I* court only remanded the case to the district court to make the necessary factual findings to determine *when* the statute of limitations began to run against the government. *Id.* at 864.

2. The Fifth Circuit's conclusion that an action based on the contractual obligation to pay money is not an "action for money damages" also conflicts with numerous decisions of other Courts of Appeals interpreting Section 2415(a) outside the context of oil and gas leases. The Eighth, Ninth, Tenth, Eleventh and D.C. Circuits have uniformly applied the six-year statute of limitations in Section 2415(a) to actions by the United States to recover monies due under a contract. *See, e.g., United States v. Dos Cabezas Corp.*, 995 F.2d 1486, 1490 (9th Cir. 1993) (suit to recover deficiency debt, arising from contract, "is 'an action for money damages founded upon a contract' subject to the six-year limitations period pro-

vided in 28 U.S.C. § 2415(a)"); *United States v. Alvarado*, 5 F.3d 1425, 1428 (11th Cir. 1993) (applying Section 2415(a) to action seeking to recover deficiency on promissory note); *United States v. Gottlieb*, 948 F.2d 1128, 1128-29 (9th Cir. 1991) (applying Section 2415(a) to action by Small Business Administration to enforce payment by guarantor on student loan); *FDIC v. Bachman*, 894 F.2d 1233, 1237 (10th Cir. 1990) (applying Section 2415(a) to claims by FDIC "to enforce notes, guaranties, or other contracts"); *United States v. Vanornum*, 912 F.2d 1023, 1025 (8th Cir. 1990) (applying Section 2415(a) to action to enforce loan guaranties); *United States v. Rollinson*, 866 F.2d 1463, 1465 (D.C. Cir.), *cert. denied*, 493 U.S. 818 (1989) (same).

This Court should grant the Phillips Petition in order to resolve the conflict between the decisions of the Fifth and Tenth Circuits regarding the time limits on the right of the United States to collect allegedly underpaid royalties under oil and gas leases. In addition, this Court should grant the Phillips Petition to resolve the conflict between the decisions of the Fifth Circuit and the decisions of other Courts of Appeals with respect to the application of Section 2415(a) to actions by the United States to recover monies due under other types of contracts with the United States.

III. THE FIFTH CIRCUIT ERRED IN HOLDING SECTION 2415(a) INAPPLICABLE.

1. The Fifth Circuit's holding that Section 2415(a) does not apply to limit the time when the federal government may bring either an administrative or a judicial action for collection of underpaid royalties not only conflicts with the Tenth Circuit, it is incompatible with the plain language of Section 2415(a) and its legislative history. The plain language of Section 2415(a) and the legislative history demonstrate that Congress intended

for Section 2415(a) to limit the government's recovery of stale royalty claims. Phillips Petition at 18-19.

Phillips' primary position, is that Section 2415(a) requires the MMS to file a judicial action for underpaid royalties within the applicable six-year period. Phillips Petition at 18. In the alternative, Phillips argues that Section 2415(a) requires MMS at a minimum to issue an administrative order for payment within this period. Phillips Petition at 19. Regardless of whether Section 2415(a) is held to apply only to judicial actions or also to administrative actions,[4] the Fifth Circuit erred in holding that Section 2415(a) applies to neither type of action.

2. In its Petition, Phillips ably explains why the Fifth Circuit's decision is entirely inconsistent with the language and purpose of Secton 2415(a). API therefore only supplements the Phillips Petition with a few brief points.

a. The Fifth Circuit's reliance on *Bowen* to define the term "money damages" in Section 2415(a) extends the reach of that decision far beyond its reasonable scope. In *Bowen*, the State of Massachusetts brought suit for declaratory and injunctive relief against the Department of Health and Human Services to enforce a statute, which provides that the Department shall reimburse states for certain Medicaid services. 487 U.S. at 887-88. The issue was whether the action should have been brought in district court or the United States Court of Federal Claims. *Id.* at 890-91. The Court held that the suit was properly brought in the district court because it was not one for "money damages," as that term is used in Section 702

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[4] *Cf. 3M Co. v. Browner*, 17 F.3d 1453, 1457 (D.C. Cir. 1994) ("Given the reasons why we have statutes of limitations, there is no discernible rationale for applying" a limitation when an "action or proceeding is brought in a court, but not when it is brought in an administrative agency.").

of the Administrative Procedure Act, 5 U.S.C. § 702 ("APA").[5]

Bowen is distinguishable from this case where the government seeks to recover damages for breach of a *contract* to pay royalties, and where the issue is the applicability of a statute of limitations as a bar to the action. As this Court recognized, the state's suit in *Bowen* to enforce the statute "is not a suit seeking money in *compensation* for the damage sustained by the failure of the Federal Government to pay as mandated; rather, it is a suit seeking to enforce the statutory mandate itself, which happens to be one for the payment of money." 487 U.S. at 900. In contrast, an action to recover allegedly underpaid royalties seeks *compensation* for breach of the lessee's obligation under the contract to pay royalties for the amount of minerals removed by the lessee. Such actions also typically seek compensation in the form of interest for the loss of the time value of the royalties allegedly due. *See* Phillips App. at 92a-94a; 30 U.S.C. § 1721(a).

Thus, *Bowen* should not be applied in contract actions to interpret the meaning of "money damages" in Section 2415(a).[6] To do so would contravene the otherwise uni-

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[5] 487 U.S. at 891-903. Section 702 of the APA provides jurisdiction to the district courts to hear actions against federal agencies "seeking relief other than money damages." 5 U.S.C. § 702.

[6] *See Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1513 (9th Cir. 1994) ("Although the Court's discussion [in *Bowen*] of the differences between monetary and specific relief was quite lengthy, it was within the context of the APA and should not be treated as a widely applicable, general rule for determination of the nature of the relief sought."). *See also North Star Alaska v. United States*, 9 F.3d 1430, 1432 (9th Cir. 1993) (*Bowen* inapplicable to determine district court's jurisdiction over suit on lease with Government because *Bowen* "was not a contract case."); *TransOhio Sav. Bank v. OTS*, 967 F.2d 598, 613 (D.C. Cir. 1992) ("[A]lthough *Bowen* invites us to reject our prior holdings, it does

form position taken by other Courts of Appeals in numerous decisions that Section 2415(a) applies to contract actions by the United States to recover money due under the contract. *See* Part II.2, *supra*.

b. In reaching its conclusion in *Bowen*, this Court relied on the legislative history of 5 U.S.C. § 702 showing that Congress intended to extend jurisdiction to the district courts over the action before the Court. 487 U.S. at 896-900. A similar inquiry into the legislative history of Section 2415(a) demonstrates that Congress intended the statutory bar to apply broadly to all contract actions for money brought by the federal government and, therefore, did not intend by the use of the term "money damages" to delimit the reach of the statutory limitations period. *See* S. Rep. No. 1328, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S.C.C.A.N. 2502, 2504 ("Subsection (a) of new Section 2415 . . . provides for a 6-year limitation which would apply to *all Government actions based on contracts* whether expressed or implied in law or in fact.") (emphasis added); *id.* ("In all such contract matters, the action would be barred unless it were brought by the Government within 6 years . . . .").

Therefore, the legislative history demonstrates that the reach of Section 2415(a) encompasses *all* contract actions for money, and should not be limited as the Fifth Circuit has done in this case. By exempting all actions to enforce contractual obligations to pay money, the Fifth Circuit has essentially eviscerated the statute.

c. In addition, the Fifth Circuit's decision undermines the equality of treatment in contract matters between the government and private parties that Congress intended to provide in Section 2415(a). *See Crown Coat Front Co. v. United States*, 386 U.S. 503, 521 n.14 (1967)

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not compel us to do so. *Bowen* did not involve a contract . . . ."), *appeal after remand sub nom. Transcapital Fin. Corp. v. Director, OTS*, 44 F.3d 1023 (D.C. Cir. 1995).

("The congressional intent [in Section 2415] to 'put the Government on a parity with those private litigants who may sue' and 'to equalize the position of litigants' is sufficiently evident.") (quoting *Hearing on H.R. 13652 Before the Subcomm. No. 2 of the House Comm. of the Judiciary*, 89th Cong., 2d Sess. 9, 11 (1966)). *See also* S. Rep. No. 1328, *supra*, 1966 U.S.C.C.A.N. at 2503 ("[I]t is only right that the law should provide a period of time within which the Government must bring suit on claims just as it now does as to claims of private individuals."). Indeed, the six-year limitation in Section 2415(a) was intended to correspond to the six-year statute of limitations applicable to civil actions by private parties against the United States set forth in 28 U.S.C. § 2401(a), and to actions against the United States in the U.S. Court of Federal Claims. *Id.* at 2508.

There is no question that actions by private parties against the United States to recover money owed under a contract are subject to the six-year statute of limitations in Section 2401(a). *See, e.g., Crown Coat Front Co.*, 386 U.S. at 510 (government contractor action against United States for adjustment in contract price in form of refund pursuant to "changes clause" in contract, subject to six-year statute of limitations in Section 2401(a)); *Victor Foods, Inc. v. Crossroads Economic Dev. of Charles County, Inc.*, 977 F.2d 1224, 1226 (8th Cir. 1992) (contract claim against Small Business Administration for reimbursement for costs as required by lease dismissed based on Section 2401(a)'s six-year statute of limitations); *Maine State Board of Education v. Cavazos*, 956 F.2d 376, 379 (1st Cir. 1992) (action by Maine Board of Education against Department of Education ("DOE") to recover $1.7 million pursuant to agreement with DOE subject to Section 2401(a)'s statute of limitations); *Sisseton-Wahpeton Sioux Tribe v. United States*, 895 F.2d 588, 590-91, 597 (9th Cir. 1990) (breach of contract action against United States for monetary relief

subject to six-year statute of limitations in Section 2401(a).

The Fifth Circuit's decision, if not reversed, would remove the six-year limitations period on actions brought by the federal government for money due under a contract. Yet a party bringing a claim against the United States for money owed under a contract would remain subject to the six-year limitations period in 28 U.S.C. § 2401(a). This upsets the parity of treatment between the government and private litigants that Congress intended by enacting Section 2415(a).

CONCLUSION

The Petition for Writ of Certiorari filed by Phillips Petroleum Company should be granted.

Respectfully submitted,

G.W. FRICK
DAVID T. DEAL
AMERICAN PETROLEUM INSTITUTE
1220 L Street, N.W.
Washington, D.C. 20005

THOMAS J. EASTMENT
Counsel of Record
KELLY A. RILEY
BAKER & BOTTS, L.L.P.
The Warner
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2400
(202) 639-7700

Counsel for Amicus Curiae
American Petroleum Institute

March 31, 1995

APPENDIX

[DOI Logo]

UNITED STATES DEPARTMENT OF
THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

[May 10, 1974]

Memorandum

To: Chief, Conservation Division,
Geological Survey

From: Assistant Solicitor, Minerals

Subject: Time for Commencing Actions to Collect Royalties, Rents, or Other Payments

You have asked us to examine the statute of limitations contained in 28 USC Sections 2415-2416 (1970) and to explain its applicability to accounting and auditing procedures of the Geological Survey.

Prior to the adoption by Congress in 1966 of the statute of limitations, the Federal Government was immune from any time limitations in bringing civil actions, with only a few minor exceptions. Since the adoption of this statute, there has been established a six-year statute of limitations for "every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or in fact." 28 USC Section 2415(a) (1970). A provision in the statute provides that actions that accrued prior to the date of the act shall be deemed to have accrued on the date of enactment. 28 USC Section 2415(g) (1970). There are exclusions from the provisions of the statute for, *inter alia*, cases in which "facts material to the right of action are not known and reasonably could not be known by an official of the United

States charged with responsibility to act in the circumstances." 28 USC Section 2416(c) (1970). The purpose of the statute is to prevent the government from sitting on claims that it knows or should know it has a right to enforce. It prevents the government from bringing a law suit to enforce a claim six years after it has discovered, or should have discovered, the existence of the claim.

It is clear that the statute applies to suits by the government to collect rents and royalties. Royalties are collected by the Geological Survey pursuant to leases, entered into under the Mineral Leasing Act, 30 USC Sections 181 *et seq* (1970), or the Outer Continental Shelf Lands Act, 30 USC Sections 1331 *et seq* (1970), or other similar statutes. In all cases, the rights of the government as lessor and the rights of the lessee are embodied in a lease. A lease is a contract, and failure of the lessee to pay rent or royalties when due gives the lessor an immediate right to sue for breach. The usual remedy for breach of contract is money damages. See 5 *Corbin on Contracts* 990 (1960) and cf. *Continental Oil Co.* v. *United States,* 184 F2d 802 (9th Cir. 1950); *United States* v. *Ohio Oil Co.,* 163 F2d 633 (10th Cir. 1947); *Rumley* v. *United States,* 152 Ct. Cl. 166, 285 F2d 773 (1961).

It should be noted that commencement of administrative proceedings to appeal or review the existence or claim of rents or royalties due would toll the running of the statute until a final administrative decision. Thereafter, the government would have only one year to bring an action in court to collect the moneys due. 28 USC Section 2415(a) (1970). Thus, where the Geological Survey demanded payment of a debt and the operator contested the debt by commencing an administrative review procedure, the six year period would not begin to run during the pendency of the administrative review or the appeal of the administrative decision. After the final

decision in the administrative process, the Justice Department would have one year in which to sue for enforcement of the decision if the operator persisted in his refusal to pay. As you know, the administrative process for review and appeal of assessments against an operator is described in 30 CFR Part 290.

The federal limitations statute contained in Section 2415 should be read in the light of the general legal principles applicable to statutes of limitations in existence prior to its enactment. Generally, unless otherwise provided in a statute of limitations, running of the statute commences on accrual of the right of action, and it is not tolled merely because the party having the right is not aware of it. 54 C.J.S. Limitations of Actions Section 205 (1948). There are exceptions to the general rule. The most obvious exception occurs in statutes of limitation that expressly require knowledge as a prerequisite to the running of the statute. Absent such an express provision, however, lack of knowledge due to fraud or forgery on the part of the person seeking to invoke the statute as a bar has been held to toll the running of the statute. *Holmberg* v. *Armbrecht*, 327 U.S. 392, 397 (1945). In tort claims against the Federal Government, it has been held that the statute of limitations, as a matter of Federal law, does not begin to run until the plaintiff has discovered his injuries. *Urie* v. *Thompson*, 337 U.S. 163 (1949) citing *Baily* v. *Glover*, 88 U.S. (21 Wall) 342 (1874). In contract cases in which the accrual of the right of action is contingent on giving notice to the party in breach, failure to give notice tolls the statute, and therefore lack of knowledge that postponed giving notice would effectively toll the statute. 54 C.J.S., *supra* Section 204.

The exclusion contained in Section 2416(c) is one of several contingencies written into the federal statute, due to experiences in the case law, to mitigate the harshness of the statute. The first issue raised by this exclusion is

the identity of the official who must acquire knowledge before the statute begins to run. In the context of the Geological Survey's administrative organization, the Supervisor is the responsible official who must know of the material facts. The legislative history of this section indicates that the Supervisor is the type of responsible official that Congress had in mind, since he is responsible for overseeing operations, receiving payments due under the lease, and enforcing the terms of the lease:

> "It is not intended that the application of this exclusion will require the knowledge at the highest level of the Government. Responsibility in such matters may extend down into lower managerial levels within an agency. As a general proposition, the responsible official would be the official who is also responsible for the activity out of which the action arose. Such an official is the one likely to know whether the material fact does involve the possibility of a cause of action which may be asserted against the Government. S. Rep. No. 1328, 89th Cong. 2d Sess. 6 (1966); 1966 U.S. Code Cong. Admin. News at 2507-2508."

As you are aware, the Supervisor's responsibilities are described in 30 CFR Chapter II in different sections corresponding to the different regulatory functions of the Geological Survey. Thus, the six year period would begin to run when the Supervisor acquired knowledge, or when he should have acquired knowledge, of a debt owed by an operator, and not at the time the existence of the debt were brought to the Director's attention nor at the time the Justice Department were informed.

The second issue raised by the exclusion focuses on what circumstances would be sufficient to invoke the exclusion due to lack of knowledge. Certainly, it seems that where lack of knowledge is due to erroneous information contained in the reports submitted to the Supervisor by the lessee, then the statute would not begin to

run before the concealment were discovered. Congress had in mind the fraud-type situation in adopting this exclusion, and the case law previously alluded to supports such an exception:

> "The committee understands that the principal application of this exclusion will probably be in connection with fraud situations. An example would be where the affirmative act of a wrongdoer has served to conceal the fraudulent act. This type of exclusion is to be found in the law of many States in both fraud and tort limitations. The material facts that are not known must go to the very essence of the right of action. S. Rep. No. 1328, *supra*."

Moreover, the case of concealment is particularly relevant to procedures of the Geological Survey. Operators are required by regulation and by lease terms to submit reports and records to the Geological Survey. If such information is incorrect, due either to mistake or intent to deceive, and the Survey is therefore unaware of claims that it could properly assert against an operator, then the concealment would operate to postpone the running of the six year period unless the Survey were negligent in discovering the concealment. It is our understanding that the Survey systematically audits information supplied to it by operators. We are in no position to judge whether the auditing techniques employed by the Survey are in accord with good business practices. It is our opinion, however, that the statute of limitations cannot be construed as requiring that the Survey do more than its personnel and budgetary resources allow. Hence, we would conclude that, if the Geological Survey is making a good faith effort within its budgetary constraints to audit information supplied by operators, then it is satisfying the duty imposed upon it to discover the existence of debts owed the government.

Whether a delay in the Supervisor's acquisition of knowledge of a breach on the part of a lessee due entirely

to the accounting procedures of the Geological Survey would toll the running of the statute is not entirely clear. Under the general rule, accounting procedures have no effect on the statute of limitations unless they affect the time at which the cause of action accrues. An example of when accounting affects accrual of a right of action is the case in which there are mutual dealings between two parties and an open or running account is maintained between them. 54 C.J.S., *supra* Section 165; *Anglo-Columbian Development Co. v. Stapleton*, 19 F2d 683, 685 (D.C. Cir. 1927). It does not appear that accounts kept by the Geological Survey are open accounts, since amounts due under leases usually have a fixed value and accrue on fixed dates. However, there may be certain accounts, such as royalty accounts, that do not become due until some affirmative action by the Supervisor has been taken, such as assessing the value of royalty oil. Failure of the Supervisor to take action prior to the due date in the lease would toll the running of the statute, not because of accounting procedures, but due to the fact that the right of the Supervisor to demand payment had not yet accrued.

Delay in acquiring knowledge of a breach due to accounting procedures may come within the purview of the statutory exclusion if it is reasonable. The terms of the statute and the legislative history indicate that the reasonableness of the cause of delay in acquiring knowledge should be controlling. The language used in the statute is:

> "[F]acts material to the right of action are not known and reasonably could not be known . . . 28 USC Section 2416(c) (1970)."

This would seem to indicate that, if the accounting procedures used by the Geological Survey are generally in accord with good business practices, then the Supervisor could reasonably rely on such procedures to convey knowledge to him, and any delay consequent thereto

would toll the statute. There is some support for this in the Senate Report:

> "This provision is required because of the difficulties of Government operations due to the size and complexity of the Government. S. Rep. No. 1328, *supra.*

On the other hand, if the accounting procedures are not in accord with good business practices, it does not appear that they would operate to toll the statute of limitations. In such a case, it would be difficult to argue that the Supervisor could not reasonably have known that a right of action eixsted. The passages from the Senate Report previously quoted indicate that Congress was aware of the complexities in governmental regulation, but that the chief utility of the exclusion would be in situations where lack of knowledge was due to actions of the party regulated. It does not appear that Congress intended the exclusion to be used to encourage bureaucratic inefficiencies that cause delay in bringing enforcement actions. Thus, it seems that the Supervisor's lack of knowledge would not be excused if its arises from self-imposed procedures that unnecessarily delay the acquisition of knowledge. The statute imposes a duty on the Supervisor to diligently use the personnel and budgetary resources of the Geological Survey to discover debts owed the government and to take action to collect debts it knows are due.

In conclusion, it is our opinion that the Federal statute of limitations does not begin to run until after the right of the Supervisor to demand payment has accrued. Accrual may be dependent on some affirmative actions of the Supervisor, such as giving notice or assessing the value of royalties due. The statute begins to run against the government when the Supervisor, relying on information conveyed to him by accounting or auditing procedures that are in accord with good business practices, learns of the accrual or when the Supervisor, using such information, reasonably could have known of the accrual.

In cases involving concealment, either intentional or innocent, of amounts owed the government by a lessee or operator, the statute would not begin to run until the government discovered its right of action. This imposes a duty on the Geological Survey to audit information supplied by lessees and operators. In our opinion, the Geological Survey is not under a duty to do more in auditing this information than its personnel and budgetary constraints allow. However, it is under a duty to diligently prosecute a right of action of which it is aware; that is, it must, proceed to collect amounts that it knows are due and owing, so that, if necessary, the Justice Department can institute an enforcement action within six years of the accrual of the right of action.

/s/ Frederick N. Ferguson
FREDERICK N. FERGUSON
Assistant Solicitor
Division of Minerals

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No. 94-1287

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

PHILLIPS PETROLEUM COMPANY,
Petitioner
v.
GARY JOHNSON, AREA MANAGER,
DALLAS AREA COMPLIANCE OFFICE,
MINERALS MANAGEMENT SERVICE, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE LOUISIANA LAND AND EXPLORATION COMPANY AS AMICUS CURIAE IN SUPPORT OF PETITIONER

FREDERICK J. PLAEGER II
WILLIAM S. COLLINS
THE LOUISIANA LAND AND EXPLORATION COMPANY
909 Poydras Street
New Orleans, Louisiana 70112
(504) 566-6712

M. HAMPTON CARVER
Counsel of Record
DAVID L. BROWNE
CARVER, DARDEN, KORETZKY, TESSIER, FINN, BLOSSMAN & AREAUX, L.L.C.
1100 Poydras Street
Suite 2700
New Orleans, Louisiana 70163
(504) 585-3800

Counsel for The Louisiana Land and Exploration Company

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether 28 U.S.C. § 2415(a), which imposes a six-year statute of limitations upon "any action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract," applies to a claim asserted by the federal government for royalties under a mineral lease.

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IN THE

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PHILLIPS PETROLEUM COMPANY,
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DALLAS AREA COMPLIANCE OFFICE,
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Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE LOUISIANA LAND AND EXPLORATION COMPANY AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The Louisiana Land and Exploration Company ("LL&E"), as amicus curiae, supports Phillips Petroleum Company's Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

The statute of limitations imposed by 28 U.S.C. § 2415 (a)[1] bars "every action for money damages brought by

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[1] 28 U.S.C. § 2415(a) provides in pertinent part:

> Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or

the United States or any officer or agency thereof which is founded upon any contract . . . unless the complaint is filed within six years." The Fifth Circuit, relying exclusively upon *Bowen v. Massachusetts*, 487 U.S. 879 (1988), held that the statute does not bar a claim by the United States initially asserted in an administrative action as opposed to in a judicial action and that the statute does not bar a claim by the United States to enforce a contract for the payment of money to the United States. In such instances, the Fifth Circuit concluded that the government seeks "monies due under a contract with the government," not "compensatory relief" or "money damages."

INTEREST OF AMICUS CURIAE

LL&E is the lessee of oil and gas leases granted by the United States. LL&E believes that the United States will make claims for royalty against it which, but for the decision below, would be barred by § 2415(a).

REASONS FOR GRANTING THE PETITION

The Fifth Circuit, having omitted any discussion of the statute of limitations in its original opinion, addressed this issue in an unpublished decision on rehearing. That decision did not discuss the contrary opinions from other circuits.[2] The opinion of the Fifth Circuit will neverthe-

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agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later. . . .

[2] *3M Company v. Brouner*, 17 F.3d 1453 (D.C. Cir. 1994); *Phillips Petroleum Co. v. Lujan*, 4 F.3d 858 (10th Cir. 1993); *Mesa Operating Ltd. Partnership v. Dep't of Interior*, 17 F.3d 1288 (10th Cir. 1994); *see also, infra*, note 7 and accompanying text.

less be binding on subsequent Fifth Circuit panels.[3] The government is a party to all suits in which the limitation could be raised, knows of the decision, and can be expected to rely on it in all contexts in which it is expedient to do so. If the Fifth Circuit's opinion stands, the government, in any instance in which it has the choice between bringing an action in an administrative proceeding or in a court can circumvent § 2415(a) by bringing the agency action. Even in the case of actions that only can be brought in the courts, the government can escape the bar whenever its contract obligates the defendant to pay money, rather than render some other performance.

The United States historically has enjoyed two basic advantages over private litigants: (1) as a defendant, it has enjoyed sovereign immunity and (2) as a plaintiff, it has enjoyed immunity from prescription. Because the government frequently engages in commercial transactions and because Congress has recognized that, in connection with such transactions, the government should be placed on equal footing with private litigants,[4] the Congress has

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[3] *Hodges v. Delta Airlines, Inc.*, 4 F.3d 350, 355 (5th Cir. 1993), *reh'g, en banc, granted*, 12 F.3d 426 (1994), *different results reached on reh'g, en banc*, 44 F.3d 334 (5th Cir. 1995); *United States v. Don B. Hart Equity Pure Trust*, 818 F.2d 1246, 1250 (5th Cir. 1987); 5th Cir. R. 47.5.3.

[4] *Crown Coat Front Co., Inc. v. United States*, 386 U.S. 503, 521 n.14 (1967) (With respect to 28 U.S.C. § 2401, which limited the government's sovereign immunity, the Court stated that Congress' intent to equalize the positions of the government and private litigants was evident); *United States v. Cardinal*, 452 F.Supp. 542, 544 (D. Vt. 1978) (With respect to § 2415, the court held that the Senate Report No. 1328, 89th Cong., 2d Sess., reprinted in [1966] U.S. Code Cong. & Admin. News, "iterates and reiterates that the purpose of the law is to increase fairness to private litigants dealing with the Government." *Id.* The court further noted that, as set out in the Senate Report, the Attorney General outlined six reasons for adopting § 2415, including "to 'make the position of the Government more nearly equal to that of private litigants'" . . . . *Id.* at 545); Letter dated February 14, 1966, from the Assist-

passed repeated acts creating exceptions to these rules. Thus, when Congress enacts such legislation, courts should construe it so as to give effect to that purpose. *See Crown Coat Front Co., Inc. v. United States,* 386 U.S. 503, 521-22 (1967). It is ironic that *Bowen v. Massachusetts,* which liberally construed an act creating an additional exception to the doctrine of sovereign immunity, should now be used as the basis for eviscerating § 2415(a) insofar as it applies to untimely claims to enforce contracts for the payment of money. Such claims, if not made timely, are the very claims Congress and most persons of common understanding would deem to be barred by §2415(a).

I. THE HOLDING THAT THE GOVERNMENT'S REMEDY OF PROCEEDING BEFORE THE AGENCY IS NOT BARRED NO MATTER HOW UNTIMELY THE CLAIM

"It would be singular if the one remedy should be barred and the other left unrestrained." *Adams v. Woods,* 6 U.S. 336, 341 (1805) (Marshall, C.J.).

The Fifth Circuit's interpretation of § 2415(a) is contrary to the rule that this Court established in 1805. In *Adams v. Woods,* the United States sought to circumvent a statute of limitations by bringing an "action for debt" in a civil proceeding in the district court rather than by filing an indictment or information in a criminal proceeding. The statute of limitations before the Court provided that no person shall be:

> prosecuted, tried or punished for any offence not capital, nor for any fine or forfeiture under any penal statute, *unless the indictment or information for the same shall be found or instituted within two*

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ant Secretary of the Interior to the Director of the Bureau of the Budget with respect to the proposal of § 2415 ("This legislation . . . equalizes the position of the Government and the private litigant when each is asserting claims against the other.").

> *years from the time of committing the offence, or incurring the fine or forfeiture aforesaid.*

The United States noted that the statute's subordinate clause, beginning with "unless" (italicized above), referred only to an *indictment* and an *information*, not also to a civil suit. Hence, the United States argued that in a civil action, as opposed to in a criminal action brought by indictment or information, the United States could proceed without regard to the bar. Justice Marshall, however, concluded that the statute of limitations did not apply "to any particular mode of proceeding, but generally to any prosecution, trial, or punishment for the offence." *Id* at 340-341. He held that a fine could be collected by action for debt as well as by information and that:

> to declare that the information was barred while the action of debt was left without limitation, would be to attribute a capriciousness on this subject to the legislature, which could not be accounted for. . . .

Id. at 341.

In the present action, the government's position again focused on the "subordinate clause" of a statute of limitations. The pertinent clause of § 2415(a), also beginning with "unless," refers to a "complaint" and not also to an order giving rise to an administrative action. Contrary to *Adams v. Woods*, however, the Fifth Circuit held that the statute of limitations applied only to actions brought by complaint and that the United States could proceed in the agency forum without regard to the bar—notwithstanding that § 2415(a) does not "apply to any particular mode of proceeding" but applies to "every action" for money damages.

The Fifth Circuit's opinion in the present action is directly contrary to *3M Company v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994), which followed *Adams v. Woods* and held that an untimely action to collect a penalty,

whether brought before an agency or a court, is equally barred by the applicable statute of limitations:

> Given the reasons why we have statutes of limitations, there is no discernible rationale for applying § 2462 when the penalty action or proceeding is brought in a court, but not when it is brought in an administrative agency.

Id. at 1456. The court, composed of Judges Buckley and Randolph and Judge, now Justice, Ginsburg, reasoned that:

> The concern that after the passage of time "evidence has been lost, memories have faded, and witnesses have disappeared" pertains equally to factfinding by a court and factfinding by an agency . . . . From the potential defendant's point of view, lengthy delays upset "settled expectations" to the same extent in either case.

Id. at 1457. The court, like this Court in *Adams*, refused to let the claim have "a perpetuity of existence" because to do so would have been "utterly repugnant to the genius of our laws." *Id.*; *accord Wilson v. Garcia*, 471 U.S. 261, 271 (1985); *Pendergast v. United States*, 317 U.S. 412, 418 (1943).

In a claim like the one he asserts here, the Secretary of the Interior represents the United States in its proprietary capacity. He has ultimate authority to make any decision committed to the Interior Department. He sits as judge in his own cause, subject only to judicial review in which courts apply deferential standards. Congress hardly would have intended that he and other federal officials be permitted to control the application of the statute of limitations by the choice of the initial forum.[5]

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[5] In the present action, neither Phillips' lease from the government nor any law required the Secretary of the Interior to bring administrative proceedings against Phillips before filing suit. The Secretary chose the administrative action.

To use the words of Chief Justice Marshall, that would indeed be "to attribute a capriciousness on this subject to the legislature." *Adams v. Woods*, 6 U.S. at 341. Yet, that is what the Fifth Circuit has done here.

II. THE HOLDING THAT THE GOVERNMENT IS NOT BARRED FROM ENFORCING A CONTRACT WHERE THE OBLIGATION IS TO PAY MONEY

The Fifth Circuit's holding that the statute is not applicable when the government "seeks money due under a contract" because the relief sought would not be "compensatory damages" is based exclusively on *Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988). The Fifth Circuit reached a result which, as explained below, neither the majority in *Bowen* nor the dissent (Justices Scalia and Kennedy and the Chief Justice) would have reached.

In *Bowen*, Massachusetts sought judicial review of a final order of the Secretary of Health and Human Services, which declined to fund certain procedures Massachusetts had adopted under the Medicaid program. The state sought declaratory and injunctive relief, including an injunction requiring the Secretary of Health and Human Services to pay to the state sums due under the Medicaid Act. With respect to suits in the district courts other than those for "money damages," Congress had waived sovereign immunity by the Administrative Procedure Act. Suits for "money damages," by contrast, could be brought only in the Claims Court.

This Court held that Massachusetts' action properly had been brought in the district court and that the relief sought was not "money damages." This Court determined that "money damages" did not have "any meaning other than the ordinary understanding of the term as used in the common law for centuries." *Id.* at 897. While the court recognized that "in many instances an award of money is an award of damages," it held that occasionally a money award is also a specie remedy. *Id.* at 895.

The Court also recognized that, in appropriate circumstances, a court may issue an injunction requiring the payment of money, and concluded that, when Massachusetts sought to require the federal government to pay over the money necessary to fund a certain category of Medicaid benefits, the state was not seeking "money damages." *Id.* at 910.

However, the Court in *Bowen* did not have occasion to decide, and certainly did not hold as the Fifth Circuit has done in *Phillips,* that, when the United States, as plaintiff, sues on a contract under which the other party obligated itself to pay money, the United States is entitled to circumvent the statute of limitations by characterizing the claim as a suit for relief other than "money damages." To have done so would have elevated form and procedure over substance and would have been contrary to "the ordinary understanding of the term [money damages] as used in the common law for centuries." *Id.* at 897.

The dissent (joined on this point by Justice White, concurring) believed that Massachusetts' suit was a suit for money damages. *Id.* at 913 (Scalia, J., dissenting). Justice Scalia recognized that, except for the means by which the judgment can be enforced, a money judgment in a case in which the obligation of the defendant is to pay money gives essentially the same relief as specific performance or injunction. Justice Scalia also recognized the common law rule, settled for centuries, that in such a case the plaintiff ordinarily is required to seek "money damages," not specific performance or other equitable relief:

> As the Court recognizes, however, the terms "damages" and "specific relief" have been "used in the common law for centuries," . . . and have meanings well established by tradition. Part of that tradition was that a suit seeking to recover a past due sum of money that does no more than compensate a plain-

> tiff's loss is a suit for damages, not specific relief; a successful plaintiff thus obtains not a decree of specific performance requiring the defendant to pay the sum due on threat of punishment for contempt, but rather a money judgment permitting the plaintiff to order "the sheriff to seize and sell so much of the defendant's property as was required to pay the plaintiff." Farnsworth, Legal Remedies for Breach of Contract, 70 Colum.L.Rev. 1145, 1152 (1970).

Id. at 918 (Scalia, J., dissenting); *accord* John Norton Pomeroy, *Specific Performance of Contracts*, § 47 (3d ed. 1926):

> It is the fundamental principle regulating the exercise of this equitable jurisdiction, that whenever the legal remedy of damages is sufficient, equity will not interfere, and the specific performance will be refused; *and this is always the case when the contract is satisfied by a payment of money.* (emphasis added).

The majority in *Bowen*, by giving a liberal interpretation to a statute waiving sovereign immunity and by holding that the statute "intended to authorize equitable suits for specific monetary relief,"[6] almost certainly did not intend to overthrow these venerable rules of law so as to allow a party, in the absence of special circumstances requiring equitable relief, to enforce a contract for the payment of money by any means except a claim for money damages.

The decision of the Fifth Circuit did, however, overthrow these rules. As Justice Scalia said the majority had done in *Bowen*, the Fifth Circuit disregarded the traditional rule that, where a party seeks money, particularly "monies due under a contract," the party is deemed to seek "money damages." The Fifth Circuit held that "money damages" normally refers to a sum of money used as compensatory relief, *i.e.*, relief which a

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[6] *Id.* at 899-900.

party receives in lieu of the performance to which the party was entitled. It held that when the government seeks "monies due under a contract with the government," it does not seek "compensatory relief" and so does not seek "money damages." Thus, the Fifth Circuit, standing the law on its head, limited the application of the statute of limitations to those instances where the government seeks "damages" because the defendant did not perform an obligation other than one to pay money.

Justice Scalia did not foresee explicitly that the majority's reasoning in *Bowen*, as he interpreted it, would lead to this result, but he did foresee other consequences:

> Today's decision is a potential cornucopia of waste. Since its reasoning cannot possibly be followed where it leads, the jurisdiction of the Claims Court has been thrown into chaos. On the other hand, perhaps this is the opinion's greatest strength. Since it cannot possibly be followed where it leads, the lower courts may have the sense to conclude that it leads nowhere, and to limit it to the single type of suit before us.

Bowen, 487 U.S. at 930 (Scalia, J., dissenting).

Insofar as Justice Scalia was sanguine, he was wrong. In *Phillips*, the Fifth Circuit followed Justice Scalia's understanding of Bowen's reasoning to reach a result which overthrew principles of law settled for centuries and, in the process, eviscerated a fundamental statute of limitations barring stale claims by the government. If *Phillips* is correct, § 2415(a) can be avoided in otherwise untimely suits to recover student loans, farm loans, rent or royalty due on surface or mineral leases, and money due under any of the host of contracts where the government claims to be owed money, not as a substitute performance, but as the performance provided for in the contract.[7]

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[7] The Fifth Circuit's opinion contradicts a long line of federal jurisprudence holding that § 2415(a) controls the government's

Finally, *Phillips* is the obverse of *Amoco Production Company v. Hodel*, 815 F.2d 352 (5th Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988), where the Secretary of the Interior argued, and the Fifth Circuit held, that a suit by Amoco for judicial review of a decision of the Interior Department declining to refund an overpayment of royalty was a suit for "money damages," and so could not be brought in the Claims Court. If Amoco's suit for the recovery of an overpayment of royalty on Outer Continental Shelf leases constituted a claim for "money damages," the Secretary's claim for an underpayment of royalty similarly constituted a claim for "money damages," and so is barred by the statute of limitations. The Fifth Circuit and the Secretary cannot have been right both in *Phillips* and *Amoco*.

The Fifth Circuit, relying solely on *Bowen*, reached a result that neither the majority nor the dissent in *Bowen* supports. The Fifth Circuit disregarded a tradition of centuries with respect to the meaning of "a claim for

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right to bring action to enforce contracts for the payment of money in a variety of contexts. *See, e.g., United States v. Alvarado*, 5 F.3d 1425, 1428 (11th Cir. 1993) (The court held that § 2415(a) barred an action by the government, on behalf of the Farmer's Home Administration, to recover on a defaulted government loan: "We conclude, as has every court that has addressed this issue, that a suit to recover from the debtor amounts owed on a promissory note is an action for money damages founded upon a contract."); *Federal Deposit Insurance Corp. v. Petersen*, 770 F.2d 141, 143 (10th Cir. 1985) (The court held that § 2415(a) barred the FDIC's action to enforce a loan guarantee contract.); *United States v. Vanornum*, 912 F.2d 1023, 1025 (8th Cir. 1990) (The court held that § 2415(a) governed an action by the government through the Small Business Administration, to enforce guarantees on defaulted loans under the SBA's loan guarantee program.); *United States v. Milam*, 855 F.2d 739, 740 (11th Cir. 1988) (The court applied § 2415(a) to the government's action to collect on three federally insured student loans.); *Federal Deposit Insurance Corp. v. Barrera*, 595 F.Supp. 894, 898-90 (D.P.R. 1984) (The court held that § 2415(a) barred the government's action to enforce guarantees on promissory notes.).

money damages." "[T]he line between damages and specific relief must surely be drawn on the basis of the substance of the claim, and not its mere form." *Bowen*, 487 U.S. at 915 (Scalia, J., dissenting). Yet, the Fifth Circuit elevated form and procedure over substance. It eviscerated the pertinent statute of limitations. The decision potentially will control the result in any untimely dispute in which the government claims that it is owed money under a contract or in which the government can choose to proceed by administrative proceeding rather than by suit in the district court. The Fifth Circuit's decision calls into question the correctness of every federal decision holding that § 2415(a) applies to government actions to enforce contracts where the other party's obligation is to pay money.

If the reasoning of *Bowen* leads to *Phillips*, *Bowen* has indeed thrown the law into chaos as forewarned by Justice Scalia.

CONCLUSION

This Court should grant Phillips' petition for a writ of certiorari.

Respectfully submitted,

FREDERICK J. PLAEGER II
WILLIAM S. COLLINS
THE LOUISIANA LAND AND EXPLORATION COMPANY
909 Poydras Street
New Orleans, Louisiana 70112
(504) 566-6712

M. HAMPTON CARVER
Counsel of Record
DAVID L. BROWNE
CARVER, DARDEN, KORETZKY, TESSIER, FINN, BLOSSMAN & AREAUX, L.L.C.
1100 Poydras Street
Suite 2700
New Orleans, Louisiana 70163
(504) 585-3800

Counsel for The Louisiana Land and Exploration Company

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Nos. 94-1287 and 94-1479

In the Supreme Court of the United States

OCTOBER TERM, 1994

PHILLIPS PETROLEUM COMPANY, PETITIONER

v.

GARY JOHNSON, ET AL.

ATLANTIC RICHFIELD COMPANY, CROSS-PETITIONER

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

DREW S. DAYS, III
Solicitor General

LOIS J. SCHIFFER
Assistant Attorney General

ANNE S. ALMY
WILLIAM B. LAZARUS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the limitations period under 28 U.S.C. 2415(a) during which the United States may commence an "action for money damages" founded upon a contract governs either the issuance by the Department of the Interior's Minerals Management Service of an administrative order directing a lessee to pay royalties due under a federal oil and gas lease or the government's filing of a counterclaim (in a suit brought by the lessee challenging the order) for enforcement of such an administrative order.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The supplemental opinion of the court of appeals on the matter at issue here (Pet. App. 1a-4a)[1] is not

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[1] Unless otherwise noted, references are to the petition and accompanying appendix in No. 94-1287.

reported, but the decision is noted at 36 F.3d 89 (Table). That court's prior opinion (Pet. App. 5a-14a) is reported at 22 F.3d 616. The opinion, orders, and judgment of the district court (Pet. App. 15a-78a) are unreported, as are the orders of the Department of the Interior's Minerals Management Service (Pet. App. 79a-100a).

JURISDICTION

The court of appeals entered its initial judgment on June 10, 1994. The court thereafter granted rehearing and entered a new judgment addressing the question presented here (but otherwise abiding by the prior opinion) on September 7, 1994. A further petition for rehearing was denied on November 1, 1994. Pet. App. 101a-103a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The complicated procedural history of this case is discussed in some detail in our petition for a writ of certiorari in *Babbitt* v. *Phillips Petroleum Co.*, No. 94-1292 (filed Jan. 30, 1995). We repeat or add here only the background and details particularly relevant to the limitations issue raised by the present petition and cross-petition.

1. Congress has authorized the Department of the Interior to enter into and administer leases providing for the development of federal oil and gas resources, including those located off the coast of the United States. See, *e.g.*, 43 U.S.C. 1331 *et seq.* (the Outer Continental Shelf Lands Act (OCSLA)). Leases for development of offshore oil and gas are generally to be granted to "the highest responsible qualified bidder" after a public, competitive bidding process, and gen-

erally provide for payment of royalties calculated as a specified percentage of the "amount or value of the production saved, removed, or sold" by the lessee. 43 U.S.C. 1337(a)(1). The value of production is to be determined by the Director of the Minerals Management Service (MMS) in the Department of the Interior, and must "never be less than the fair market value." 30 C.F.R. 206.150 (1987).[2] As a practical matter, however, lessees track and report their own production, its value, and the royalties due thereon, subject to audit by MMS's Royalty Compliance Division. See generally, *e.g.*, 30 C.F.R. 217.50, 218.50; see also *Cities Service Oil & Gas Corp.*, 113 IBLA 255, 260 (1990).

In 1983, Congress concluded that the government's methods of determining and collecting oil and gas lease royalties were "archaic and inadequate." Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), Pub. L. No. 97-451, § 2(a)(2), 96 Stat. 2448 (1983), codified at 30 U.S.C. 1701(a)(2). Congress therefore acted "to clarify, reaffirm, expand and define the authorities and responsibilities of the Secretary of the Interior to implement and maintain a royalty management system for oil and gas leases," and "to require the development of enforcement practices that ensure the prompt and proper collection and disbursement of oil and gas revenues owed to the United States." 30 U.S.C. 1701(b)(2)-(3).[3]

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[2] The valuation regulation applicable to the periods of production at issue in this case was substantially expanded and redesignated as of March 1, 1988. See 30 C.F.R. 206.152-206.153; 53 Fed. Reg. 1230 (1988).

[3] Section 109 of FOGRMA establishes a graduated scale of penalties for persons who fail or refuse to comply with FOGRMA or related requirements. 30 U.S.C. 1719. Section

FOGRMA directs the Secretary to establish "a comprehensive inspection, collection and fiscal and production accounting and auditing system * * * to accurately determine oil and gas royalties * * * and to collect and account for such amounts in a timely manner." 30 U.S.C. 1711(a). In particular, the Act directs the Secretary to "audit and reconcile, to the extent practicable, all current and past lease accounts for leases of oil or gas and [to] take appropriate actions to make additional collections or refunds as warranted." 30 U.S.C. 1711(c)(1). Lessees, in turn, are required to maintain and provide whatever records, reports, and information the Secretary may reasonably require by rule for purposes of implementing the Act. 30 U.S.C. 1713(a). Relevant records must be maintained for six years "unless the Secretary notifies the record holder that he has initiated an audit or investigation involving such records," in which case they must be maintained "until the Secretary releases the record holder" from its retention obligation. 30 U.S.C. 1713(b).

The Secretary has delegated responsibility for administering lease arrangements and enforcing royalty requirements to the Director of the MMS. See generally 30 C.F.R. Pt. 218 (1987); 30 C.F.R. 218.150, 241.51 (1987). Lessees may appeal the orders or decisions of subordinate MMS officials to the Director. See 30 C.F.R. 290.1-290.5 (1987). The

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112(a) confers broad authority on the Attorney General, "[i]n addition to any other remedy under [FOGRMA] or any mineral leasing law," to bring civil actions in the federal courts "to restrain any violation of [FOGRMA]" or "to compel the taking of any action required by or under [FOGRMA] or any mineral leasing law of the United States." 30 U.S.C. 1722(a).

Director's decisions, in turn, are subject to review by the Interior Board of Land Appeals (IBLA), which renders final agency decisions on such issues on behalf of the Secretary. See 30 C.F.R. 290.7 (1987); 43 C.F.R. 4.1, 4.1(b)(3) (1987).

2. In 1986, the Regional Manager of MMS's Tulsa, Oklahoma compliance office ordered a lessee affiliate of cross-petitioner Atlantic Richfield Company (ARCO) to pay additional royalties on prior production of certain natural gas liquid products (NGLPs). ARCO appealed that order to the MMS Director, who affirmed it. See 94-1292 Pet. App. 100a-101a. ARCO then appealed to the IBLA, which modified MMS's NGLP valuation methodology and remanded for recomputation of the additional royalties due. *Conoco and ARCO Oil & Gas Co.*, 110 IBLA 232 (1989) (*reprinted at* 94-1292 Pet. App. 98a-121a); see also 94-1292 Pet. 8-10.

Shortly after the IBLA's decision on ARCO's appeal, MMS issued three additional NGLP royalty compliance orders to ARCO and one to petitioner Phillips Petroleum Company. Petitioners[4] both filed suit to block enforcement of the orders, arguing in part that some or all of the additional royalty claims were barred by the statute of limitations set out in 28 U.S.C. 2415(a) for government suits seeking money damages for breach of contract. ARCO later amended its complaint to add a challenge to the IBLA's decision. The two actions were consolidated with each other and with two additional suits by Phillips raising similar statute-of-limitations (and

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[4] For simplicity, we refer to petitioner Phillips and cross-petitioner ARCO collectively as "petitioners."

other) issues in the context of a different royalty dispute.[5]

After the Department had filed its initial answer, a different district court hearing a similar case brought by Phillips to enjoin enforcement of another royalty compliance order issued by the MMS held that the government was required to file a counterclaim in order to seek enforcement of the order. See *Phillips Petroleum Co.* v. *Lujan*, No. 89-C-914-B (N.D. Okla. May 5, 1992). Although the Department disagreed with that decision, it moved to protect its position in this litigation by requesting leave to amend its answer and to add counterclaims seeking a declaration of the validity of the MMS orders and a court order requiring Phillips and ARCO to comply with the MMS orders. See Gov't C.A. Br. 8-9 & n.5. Petitioners opposed the government's motion, arguing that because the counterclaims were "merely the mirror image of plaintiffs' complaints," they were "not complaints for money damages as required by 28 U.S.C. § 2415." See *id.* at 9. The district court granted the government's motion to file the counterclaims, to relate back to the date of the government's original answers. See *ibid.*

ARCO moved for summary judgment on the counterclaims, contending that the government's

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[5] The non-NGLP cases challenged MMS orders requiring payment of additional royalties on certain amounts received from purchasers as reimbursement for production-related costs. The substantive issue involved was resolved in favor of the government in other litigation, see *Mesa Operating Ltd. Partnership* v. *United States Dep't of Interior*, 931 F.2d 318 (5th Cir. 1991), cert. denied, 502 U.S. 1058 (1992), leaving primarily the limitations challenge to be resolved in this proceeding.

counterclaims did not constitute "a complaint (or even a counterclaim) for money damages, as required by § 2415," and that "the enforceability of the orders must await the filing by the defendants of the proper procedural vehicle to collect the royalties that are claimed due—a complaint for money damages." See Gov't C.A. Br. 9. Phillips similarly argued that the counterclaims did not constitute complaints for money damages. See *id.* at 9-10.

On petitioners' initial claims challenging the MMS orders, the district court granted partial summary judgment for the Secretary, upholding the Department's NGLP valuation methodology and the orders' requirement that the companies recompute royalties due. Pet. App. 52a-77a. The court also granted partial judgment for petitioners, holding that Section 2415(a) "bars the Government from bringing any causes of action against Phillips and ARCO based on royalty payments * * * that are due and owing for more than six years." Pet. App. 52a; see *id.* at 37a-52a, 77a. In a later order (*id.* at 18a-20a) granting in part the government's motion for summary judgment on the counterclaims, however, the court clarified that its prior order had "ruled that the MMS's orders issued to Phillips and ARCO were valid and enforceable." *Id.* at 18a. Noting that its prior discussion of Section 2415(a) "applie[d] only to an 'action for money damages'" and "indicate[d] how the Court would treat a claim for money damages if one were to be filed," the court made clear that "no such action is currently pending" and that "section 2415 has no direct application to the MMS orders." Pet. App. 19a. The court therefore granted judgment on the counterclaims to the extent that the government sought to enforce the MMS orders in accordance with their

terms and those portions of the court's order granting summary judgment on the merits. *Id.* at 15a-17a.

3. The court of appeals initially reversed on the basis of an interpretation of the rulemaking provisions of the Administrative Procedure Act, 5 U.S.C. 553(b), relevant to some but not all of the consolidated cases, without reaching the statute-of-limitations issue. Pet. App. 5a-14a. The panel's APA ruling is the subject of our petition for a writ of certiorari in No. 94-1292. Both parties sought rehearing on the limitations question, and the court issued a supplementary opinion resolving the issue in favor of the Secretary. Pet. App. 1a-4a.

The court rejected petitioners' argument that 28 U.S.C. 2415(a) bars the issuance or enforcement of administrative orders to pay past due royalties, holding that "actions for money damages" within the meaning of that Section "are commenced by filing a complaint" and involve "a suit in court seeking compensatory damages." Pet. App. 3a. In this case, the court held, the United States had filed no "complaint" for purposes of Section 2415(a). Pet. App. 3a & n.1. In addition, relying on this Court's decision in *Bowen* v. *Massachusetts*, 487 U.S. 879, 893 (1988), the court held that the royalties sought by the MMS orders could not be considered "compensatory," and therefore did not fall within the proper construction of the term "money damages" as used in 28 U.S.C. 2415(a). Pet. App. 4a. Thus, collection of royalties through enforcement of the agency's orders was not barred by Section 2415(a). Pet. App. 4a.

ARGUMENT

1. Petitioners argue (*e.g.*, Pet. 25) that the general statute of limitations for "action[s] for money damages brought by the United States * * * founded upon any contract," 28 U.S.C. 2415(a), bars the Department of the Interior from issuing an administrative order for the payment of royalties on a federal offshore gas lease, or from seeking judicial enforcement of such an order, more than six years after petitioners' obligation to calculate and pay those royalties first arose.[6] That contention is incorrect for several reasons.

a. Section 2415(a) is a general background statute of limitations, which applies "except as otherwise provided by Congress." 28 U.S.C. 2415(a).[7] As described above, however (see pages 2-5, *supra*), the Outer Continental Shelf Lands Act (OCSLA), the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), and the regulations implementing them together create a comprehensive structure for the administration and development of federal offshore natural gas resources. That structure contains its own enforcement mechanisms, which do not depend on the filing of any "action for money damages" covered by Section 2415(a).

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[6] The cross-petition in No. 94-1479 merely "adopts and incorporates by reference" the petition in No. 94-1287 (94-1479 Pet. 6), without advancing any significant additional argument. Our response therefore does not differentiate between the two.

[7] Limitations provisions such as Section 2415(a) are, of course, to be strictly construed in favor of the government. *Badaracco* v. *Commissioner*, 464 U.S. 386, 391 (1984) (quoting *E.I Dupont de Nemours & Co.* v. *Davis*, 264 U.S. 456, 462 (1924)).

Lessees are initially responsible for computing and paying the royalties due under their leases. The Secretary retains, however, the ultimate authority to determine the value of the production on which royalties are based, and lessees remain responsible to make required royalty payments "in the time and manner * * * specified by the Secretary." 30 U.S.C. 1712(a)(1). That system requires, and the law provides, a structure for the audit of lessees' payments and the refund or collection of amounts overpaid or underpaid. See generally 30 U.S.C. 1701, 1711(a) and (c).

As petitioners explain (Pet. 5-6), once an audit identifies a possible underpayment, Minerals Management Service (MMS) officials consult with the lessee in an attempt to agree on the proper amount. If that attempt fails, the MMS issues an order directing the lessee to pay the additional amount it determines to be due. That order is appealable within the Department of the Interior, and the Department's final decision, rendered by the Interior Board of Land Appeals (IBLA), is subject to review by the courts.[8]

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[8] The Department's regulations require a lessee to exhaust its administrative remedies before challenging a royalty payment order in court. 30 C.F.R. 243.3; see also 43 C.F.R. 4.21(c) (addressing exhaustion at administrative appeals stage). Although Section 243.3 was first adopted in 1992, the Department has taken the position (in *Atlantic Richfield Co.* v. *Babbitt*, No. 93-5040 (10th Cir.) (argued Nov. 16, 1994)) that its regulations and the structure of the administrative process required exhaustion before then, including at the time of the orders in this case. See 43 C.F.R 4.21(c) (1991); 30 C.F.R. 243.2 (1991) (authorizing suspension of MMS orders to pay additional royalties pending appeal to Director of MMS); *Marathon Oil Co.*, 90 IBLA 236 (1986) (discussing standards for suspension in such cases); *Darby* v. *Cisneros*, 113 S. Ct. 2539 (1993) (con-

Petitioners argue (Pet. 6) that in order to collect an amount that the MMS has ordered the lessee to pay, "the MMS must seek enforcement of its order from a federal district court." The practical reality, however, is different.

In the Department's experience, once an order to pay has been issued, the lessee either pays the amount due or pursues the available administrative procedures to challenge that order, perhaps followed by judicial review of a final administrative decision affirming the MMS's position.[9] Where a court upholds the Department's final decision, the lessee routinely pays the royalties due. Congress has provided a variety of remedies for nonpayment. See 30 U.S.C. 1719(c)(1) (penalty for "knowingly or willfully fail[ing] to make any royalty payment by the date as specified by * * * order"); 30 U.S.C. 1719-1720 (other civil and criminal penalties under FOGRMA); 30 U.S.C. 1722(a) (civil action to "restrain any violation" or to "compel the taking of

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struing 5 U.S.C. 704 with respect to finality and exhaustion). In these cases, some of the MMS orders issued to Phillips were affirmed by the Assistant Secretary of the Interior for Land and Minerals Management, thus obviating, as a practical matter, any question of finality as to them. Similarly, because ARCO amended its complaint to include a challenge to the final IBLA decision concerning NGLP valuation, the government did not raise a finality objection to judicial review of the other NGLP orders, which involved substantially identical legal issues. See Pet. App. 36a n.6; compare Pet. 6 (asserting, in passing, a much broader finality argument).

[9] Some lessees have paid the amount due under an administrative order and then sought recovery in the United States Court of Federal Claims. *E.g.*, *Black Butte Coal Co.* v. *United States*, 27 Fed. Cl. 699, vacated after settlement, 14 F.3d 612 (Fed. Cir. 1993).

any action required"); 43 U.S.C. 1350 (civil and criminal penalties under OCSLA); 43 U.S.C. 1334(d) (cancellation of leases under OCSLA for non-compliance with the Act, regulations, or lease). Direct judicial enforcement of a royalty payment order is only one such remedy. Indeed, the Department of the Interior is not aware of any action first brought by the government for judicial enforcement of a royalty payment order.[10]

The various statutory provisions just cited (together with the implementing regulations) represent, in structure and practice, a comprehensive royalty assessment and collection system. Within that system, Congress has provided certain legal or practical time limitations. See 30 U.S.C. 1755 (non-fraud civil penalty actions must be brought within six years); 30 U.S.C. 1713(b) (records on which audits are based must be maintained for a minimum of six years, unless the Secretary notifies the lessee that he has initiated an audit or investigation and that the records must be retained for a longer period). It is unlikely that when Congress enacted those provisions, and directed the Secretary to "audit and reconcile * * * *all* current and past lease accounts * * * and [to] take appropriate actions to make additional collections or refunds as warranted" (30 U.S.C. 1711(c)(1) (emphasis added)), it intended to incorporate *sub silentio* an additional limitations

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[10] The government need not counterclaim for enforcement as part of its response to a lessee's judicial challenge to the validity of a royalty payment order. See *Mesa Operating Ltd. Partnership* v. *United States Dep't of Interior*, 17 F.3d 1288, 1291-1292 (10th Cir. 1994). The counterclaim filed in this case was essentially protective. See page 6, *supra*.

provision designed for general actions to redress breaches of contracts with the government. To the contrary, the requirement in 30 U.S.C. 1713(b) that a producer maintain its records indefinitely, so long as the Secretary has notified it, within an initial six-year retention period, that he has "initiated an audit or investigation," strongly implies that Congress did not envision the application of a six-year statute of limitations drawn from outside FOGRMA's comprehensive statutory scheme. For these reasons, administrative and judicial proceedings involving the oil and gas royalty management provisions represent the sort of actions for which Congress has "otherwise," and more specifically, provided, and to which 28 U.S.C. 2415(a) simply has no application.

b. In any event, the other terms of Section 2415(a) make clear that it does not apply to bar enforcement of the royalty payment orders at issue in this case. The counterclaim in this case sought enforcement of administrative orders that petitioners had put at issue before the court through *their* complaint seeking a declaration that those orders were invalid. As the court of appeals held, neither the orders themselves nor the counterclaim for enforcement may properly be considered a "complaint" initiating an "action for money damages" within the meaning of Section 2415(a). Pet. App. 3a-4a & n.1; see also *id.* at 19a.

As described above, the normal practice under the Acts in question here is for producers to comply with the Interior Department's royalty payment orders, certainly once their validity has been upheld on judicial review. It should make no difference that in this case the Department asked the reviewing court to enter its own order confirming petitioners'

responsibility to pay. That request is not, in any traditional sense, an "action for money damages."

The situation is analogous, instead, to that in *Bowen* v. *Massachusetts*, 487 U.S. 879, 892-893 (1988), in which this Court held that an action to compel the federal government to pay to a State money claimed to be owed under the statutory terms of the Medicaid program was not an action seeking "money damages" within the meaning of the second sentence of 5 U.S.C. 702. The enforcement claim (and the underlying order) in this case, like the statutory reimbursement claim in *Bowen*, invoked the equitable powers of the district court to require petitioners "to belatedly pay expenses that [they] should have paid all along" under the applicable statutory and regulatory scheme. *Bowen*, 487 U.S. at 893-894 (quoting *School Committee* v. *Department of Education*, 471 U.S. 359, 370-371 (1985)). Under OCSLA and FOGRMA, the Secretary is entitled to determine the value of production that is subject to royalties and to implement that determination through payment orders. Equitable enforcement of such an order is not an order to pay "money damages." See also *Bowen*, 487 U.S. at 893-901.[11]

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[11] The *Bowen* Court pointed out (487 U.S. at 893) that "[t]he fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'" Instead, the Court distinguished (*ibid.*) "an action at law for damages" from "an equitable action for specific relief." The Court quoted extensively (*id.* at 895) from Judge Bork's opinion in *Maryland Dep't of Human Resources* v. *Department of Health & Human Services*, 763 F.2d 1441, 1446 (D.C. Cir. 1985), in which he noted that the State was "seeking funds to which a statute allegedly entitle[d] it, rather than money in compensation for the losses * * *

c. Nor may the government's request for enforcement of its royalty payment order properly be characterized, under Section 2415(a), as an "action * * * founded upon [a] contract." Any request for enforcement of an order is, of course, founded upon the order to be enforced. And in this case that order is properly "founded" upon the statutory and regulatory requirements that lessees pay royalties on the full value of their production from federal leases, and upon MMS's corresponding audit and collection responsibilities.

To be sure, in designing its system for administering the private exploitation of the public's offshore natural gas resources, Congress built around a lease arrangement similar to that traditionally used for production arrangements among private parties. The mere fact that such a lease is itself a "contract" does not, however, transform an MMS order to pay, issued under an administrative scheme designed to implement the Secretary's independent responsibility to determine production values and collect appropriate royalties, into a mere contract claim. Nor can it transform a request to enforce such an order into an "action" that is "founded upon" a contract. Cf. *Transohio Sav. Bank* v. *Director, OTS*, 967 F.2d 598, 609 (D.C. Cir. 1992) (claims based on statutory obligations are not

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[that it had] suffered by virtue of the withholding of those funds." Similarly, in this case the government, in its counterclaim, merely asked the district court to give effect to the court's own judgment concerning the validity of the MMS orders (see Pet. App. 18a-19a & n.2)—or, at most, to "compel the taking of [an] action required by or under" FOGRMA, in accordance with the *equitable* enforcement provisions of 30 U.S.C. 1722(a).

contractual for purposes of 5 U.S.C. 702, even if those obligations are incorporated in a contract); *Katz* v. *Cisneros*, 16 F.3d 1204, 1209 (Fed. Cir. 1994) (similar).

All of the numerous cases involving disputes between the MMS and producers over royalty obligations have turned on questions of statutory and regulatory construction, not on the meaning of contract terms. See, *e.g.*, *Amoco Production Co.* v. *Lujan*, 877 F.2d 1243 (5th Cir.), cert. denied, 493 U.S. 1002 (1989); *Diamond Shamrock Exploration Co.* v. *Hodel*, 853 F.2d 1159 (5th Cir. 1988); *Mesa Operating Ltd. Partnership* v. *United States Dep't of the Interior*, 931 F.2d 318 (5th Cir. 1991), cert. denied, 502 U.S. 1058 (1992); *Hoover & Bracken Energies, Inc.* v. *United States Dep't of Interior*, 723 F.2d 1488 (10th Cir. 1983), cert. denied, 469 U.S. 821 (1984). In this case, too, petitioners' challenges to the MMS orders on their merits involved the interpretation of applicable statutory and regulatory provisions, not the construction of any of the terms of petitioners' various lease instruments. When the Department's position is sustained and an order's validity upheld in such litigation, a request for enforcement of the order engages neither the language nor the policies of Section 2415(a).

2. Petitioners contend further (Pet. 14) that the decision below is "in tension" with that in *3M Co.* v. *Browner*, 17 F.3d 1453 (D.C. Cir. 1994). They base that contention on the court of appeals' rejection of petitioners' novel theory (Pet. 14-15, 25-26) that Section 2415(a) applies not only to judicial filings seeking enforcement of administrative royalty payment orders (such as the government's counterclaim in this case), but to the agency's issuance of those orders themselves.

3M applied a very different general limitations provision, 28 U.S.C. 2462, which imposes a five-year limit on any "action, suit or proceeding" to enforce a civil penalty. The court in *3M* focused on Section 2462's use of the term "proceeding," the fact that the Administrative Procedure Act and other statutes "call[] agency adjudications 'proceedings,'" see 5 U.S.C. 554(b), and the use of the same term in the defendant Environmental Protection Agency's regulations to describe the agency's process for assessing civil penalties. 17 F.3d at 1456. Under those circumstances, the court held that Section 2462 governed the EPA's initiation of administrative civil penalty "proceedings" as well as the commencement of a judicial action.

Section 2415(a), by contrast, does not use the term "proceeding." The court of appeals correctly recognized (Pet. App. 3a) that the statutory terms "complaint" and "action for money damages" refer to "a suit in court." Petitioners' contrary theory would transform the statutory phrase "unless the complaint is filed" into "unless the preliminary agency action, subject to internal appeal and later judicial review, is taken." That construction is implausible, and would conflict with language elsewhere in the same statute (which clearly refers to judicial actions) as well as with decisions of other courts. See 28 U.S.C. 2415(e) (referring to actions "timely brought" and then "dismissed without prejudice," and to the "defendant" in a subsequent action); see also, *e.g.*, *S.E.R., Jobs For Progress, Inc.* v. *United States*, 759 F.2d 1, 4-5 (Fed. Cir. 1985) (contract officer's decision and subsequent administrative proceedings not subject to Section 2415(a)); *Doko Farms* v. *United States*, 956 F.2d 1136, 1139-1141 (Fed. Cir. 1992) (statute barring suit to

collect amount due "does not bar the government from invoking its administrative remedies"); *Thomas* v. *Bennett*, 856 F.2d 1165, 1169 (8th Cir. 1988) (running of statute of limitations barred suit on student loan, but not set-off of amount due against later tax refund).

3. Finally, petitioners contend (Pet. 11-12) that the decision below conflicts with those of the Tenth Circuit in *Phillips Petroleum Co.* v. *Lujan*, 4 F.3d 858 (1993), and *Mesa Operating Ltd. Partnership* v. *United States Dep't of Interior*, 17 F.3d 1288 (1994).[12] In fact, however, the Tenth Circuit has never addressed the question presented by the petition and cross-petition.

In *Phillips*, the government did not dispute the general applicability of Section 2415(a) in the district court, and that question was neither briefed nor argued to the court of appeals. Both the parties and the court focused instead on questions of accrual and tolling, as affected by the special nature of the federal leasing and audit program. Under the circumstances, the court's notation (4 F.3d at 860 n.1), in passing and without analysis, that it "agree[d] with the parties that 28 U.S.C. § 2415(a) is the controlling statute of

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[12] Petitioners also argue (Pet. 12-14) that the decision below conflicts with a variety of decisions applying Section 2415(a). Most of those decisions are simply inapposite, because they involved claims that were concededly contractual, in circumstances far removed from the specialized statutory and administrative regime involved here. See Pet. 13-14, and cases there cited. Indeed, in light of the cases petitioners cite, their observation that "the application of Section 2415(a) depends on the substance of a claim rather than its form" (Pet. 14) supports the government's position more clearly than it does their own.

limitations," cannot be accepted as an authoritative holding. See, *e.g.*, *Director, OWCP* v. *Greenwich Collieries*, 114 S. Ct. 2251, 2257 (1994); *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38 (1952); *In re Stegall*, 865 F.2d 140, 142 (7th Cir. 1989) (Posner, J.).

Similarly, in *Mesa* the Tenth Circuit assumed, but did not decide, the applicability of Section 2415(a). See 17 F.3d at 1289, 1291. Mesa had already lost a substantive challenge to a royalty payment order in the Fifth Circuit. See *id.* at 1290. In the Fifth Circuit litigation, Mesa had never claimed limitations as a bar to enforcing the order, and it had posted a bond promising to pay if it lost the case. See *id.* at 1290-1291. After the government reiterated its demand for payment, Mesa sued in a district court in the Tenth Circuit to bar collection, relying on Section 2415(a). The parties briefed the applicability of that Section before the court of appeals (see, *e.g.*, 92-5241 Gov't C.A. Br. 20-26), but the court did not reach the issue. Instead, the court concluded that, under the circumstances, Mesa's conduct of the prior litigation precluded any application of the statute of limitations.

Thus, contrary to petitioners' contention, the issue of whether Section 2415(a) applies to requests for judicial enforcement of natural gas royalty payment orders of the sort at issue here remains open in the Tenth Circuit. We are informed that there are at least a dozen cases presently pending in district courts in that circuit, the Ninth Circuit, and the District of Columbia Circuit in which the appli-

cability of Section 2415(a) is squarely presented.[13] If and when those cases reach the appellate level, each of the relevant courts of appeals will have the opportunity to consider the matter *de novo*, with the benefit of full briefing and argument. If any of those courts disagrees with the decision in this case and holds that Section 2415(a) does apply in like circumstances, a concrete circuit conflict on that issue will then be presented. The Court may then consider whether the issue is of sufficient practical importance to warrant review.[14] Until that time, however, review by this Court would be premature.

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[13] In two cases the issue has been fully briefed and argued and the parties are awaiting decisions. *Marathon Oil Co.* v. *Babbitt*, No. 94-N-1429 (D. Colo.); *Samedan Oil Corp.* v. *Deer*, No. 94-CV-02123 (RCL) (D.D.C.). Briefing is scheduled to begin in April in a third case, *Atlantic Richfield Co.* v. *Department of Interior*, No. 94-62-BLG-JDS (D. Mont.).

[14] As petitioners acknowledge (Pet. 18 n.8), even if Section 2415(a) applies to the issuance or enforcement of royalty payment orders, further questions (not presented by petitioners in this case) necessarily arise concerning when the government's cause of action accrues under that Section, and the application of the tolling provision in 28 U.S.C. 2416(c) in the particular context of MMS audits under FOGRMA. Section 2416(c) excludes, for purposes of computing the six-year limitations period under Section 2415(a), "all periods during which * * * facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances." In the *Phillips* case on which petitioners rely in asserting a conflict here, the Tenth Circuit recognized that the government will usually need to conduct an audit to discover that additional royalties are owed, and that FOGRMA's auditing and record-retention provisions would have to be taken into account in determining when the government "reasonably" should have known of an underpayment of

CONCLUSION

The petition and cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

LOIS J. SCHIFFER
Assistant Attorney General

ANNE S. ALMY
WILLIAM B. LAZARUS
Attorneys

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royalties. See 4 F.3d at 863-864. Petitioners therefore err in suggesting that the application of Section 2415(a) would necessarily result in a rigid six-year limitations period. Because the Tenth Circuit has not yet *either* passed upon the argument that Section 2415(a) does not apply at all in this setting *or* elaborated further, since *Phillips*, on how tolling principles should be applied in this setting, it is not clear at this point how much, if any, practical difference there might ultimately be in the results reached by the court below and the Tenth Circuit (or the other courts of appeals that have not yet addressed either of those issues).

(5)

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No. 94-1287

In the Supreme Court of the United States

OCTOBER TERM, 1994

PHILLIPS PETROLEUM COMPANY, PETITIONER

v.

GARY JOHNSON, AREA MANAGER, DALLAS AREA COMPLIANCE OFFICE, MINERALS MANAGEMENT SERVICE, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONER

WILLIAM G. PAUL
KENNETH E. ROGERS
Office of the General Counsel
Phillips Petroleum Company
1260 Adams Building
Bartlesville, OK 74004

ARTHUR M. (RUSS) MEYER, JR.
T.L. (TOM) CUBBAGE II
Brown McCarroll &
Oaks Hartline
300 Crescent Court
Dallas, TX 75201-6929

ANDREW L. FREY
Counsel of Record
KENNETH S. GELLER
DONALD M. FALK
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0602

Counsel for Petitioner

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REPLY BRIEF FOR THE PETITIONER

The government does not dispute that the decision below allows the Minerals Management Service ("MMS") unlimited time to bring royalty collection actions, despite the six-year statute of limitations for actions "founded upon any contract." 28 U.S.C. § 2415(a). The government also does not dispute that the Fifth Circuit's reading of the statutory term "action for money damages" squarely conflicts with several other circuits' interpretations of that term as it is used in Section 2415(a). See Pet. 13-14. The government does not deny that most royalties paid on federal mineral leases are paid on leases within the Fifth Circuit's territory, so that, regardless of the positions of the other courts of appeals, the decision below will have sweeping effects on mineral lessees.

The government not only does not contest the importance of the holding below, but admits (Br. in Opp. 19-20) that the

same question is presented in more than a dozen cases currently in the district courts. The government mistakenly suggests that the existence of so many cases warrants the denial of review here. On the contrary, the proliferation of similar cases demonstrates the recurring importance of the question presented. The government offers no hope that the flood of stale royalty claims will abate.[1]

Instead, the government offers several insupportable arguments. First, the government claims that the Tenth Circuit did not mean what it said when it "agree[d]" that Section "2415(a) is the controlling statute of limitations" for MMS royalty collection actions (*Phillips Petroleum Co.* v. *Lujan*, 4 F.3d 858, 860 & n.1 (1993)), and when it reiterated that "the statute of limitations would * * * be[] a defense to payment" in those actions (*Mesa Operating Limited Partnership* v. *Lujan*, 17 F.3d 1288, 1291 (1994)). Second, the government defends the merits of the decision below. The government claims that the Federal Oil and Gas Royalty Management Act ("FOGRMA"), which applies an identical six-year limitations period to other contexts, silently displaces Section 2415(a) as it applies to mineral leases. The government further contends that an action to enforce an obligation under a mineral lease is not "founded upon a[] contract." Finally, the government claims that stale royalty collection actions do not implicate the policies of statutes of limitations. These meritless assertions should not dissuade the Court from reviewing this case.

1. The government attempts to minimize the conflict between the Fifth and the Tenth Circuits. Br. in Opp. 18-20. The government does not deny that these two courts of

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[1] The government suggests (Br. in Opp. 20 n.14) that this Court should postpone consideration of the threshold question whether Section 2415(a) applies until more lower courts reach the issue of tolling under Section 2416(c). But the presence of subsidiary questions in some cases is no reason not to consider the primary question in all of the cases.

appeals have jurisdiction over the greatest number of mineral leases, nor does it dispute that the decision below is binding Fifth Circuit precedent. Instead, the government claims (Br. in Opp. 19) that the Tenth Circuit "has never addressed the question presented by the petition."

The panel of the Tenth Circuit that expressly "agree[d]" that Section 2415(a) applied to MMS royalty collection actions (*Phillips*, 4 F.3d at 860 n.1) most certainly "addressed the question." Three additional Tenth Circuit judges accepted as settled law that the statute of limitations provides a defense against stale collection efforts by the MMS. See *Mesa*, 17 F.3d at 1291.

The application of Section 2415(a) to royalty collection actions was a necessary premise for the decisions in both cases. The government nonetheless asserts that *Phillips* lacks precedential value because the question whether the limitations period applied, as opposed to *how* it applied, "was neither briefed nor argued to the court of appeals." Br. in Opp. 18. But the tolling question before the *Phillips* court would have been meaningless — and any decision would have been nugatory — unless Section 2415(a) in fact applied to royalty collection actions. The "mere fact that an issue was not argued or briefed does not undermine the precedential force of a considered holding." *Monell* v. *Department of Social Services*, 436 U.S. 658, 709 n.6 (1978) (Powell, J., concurring); see also *United States* v. *Pierre*, 781 F.2d 329, 333 (2d Cir. 1986). The Tenth Circuit's holding, although terse, clearly was "considered." Rather than assuming that the limitations provision applied, the court first held that "oil and gas leases are contracts." It then reasoned that "§ 2415(a) is the controlling statute of limitations" because it applies to every government action "'which is founded upon any *contract*,'" and added judicial emphasis to the statutory text. 4 F.3d at 860 n.1.

In *Mesa*, the question whether "Mesa's conduct * * * precluded any application of the statute of limitations" (Br. in Opp. 19) likewise would have been meaningless if — as the government argued in its Tenth Circuit brief (see *ibid.*) — the statute did not apply to mineral lease royalty collection actions at all. Citing *Phillips*, the Tenth Circuit responded to the government's argument in no uncertain terms: "The statute of limitations would have been a defense to payment * * * ." 17 F.3d at 1291. The court reiterated that its waiver holding alone deprived Mesa of what otherwise would have been "the cover of the statute of limitations to avoid payment of the royalties." *Id.* at 1291-1292. The Tenth Circuit did not fail to "reach" the government's argument that the statute did not apply at all (Br. in Opp. 19); rather, the court rejected that contention out of hand on the authority of *Phillips*.

As we demonstrated in the petition (at 11-15), the conflict between the law of the Tenth Circuit and the decision below warrants resolution by this Court.

2. Both before and after the enactment of the FOGRMA, government officials repeatedly acknowledged that Section 2415(a) applies to royalty collection. Indeed, the Procedure Paper that the government seeks to uphold in No. 94-1292, and which provided the basis for some of the MMS's most egregious attempts to enforce stale claims in this case (see Pet. 7), explicitly acknowledged that "[b]ecause of the six-year statute of limitations, the MMS is generally concerned only with" royalty payments within past six years. See No. 94-1292 Pet. App. 131a. Until recently, few have doubted that mineral royalty collection efforts ultimately were subject to Section 2415(a).[2] Now, however, the government offers

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[2] See *Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act*, 58 Fed. Reg. 15,881 (1993) (because "[s]ome gas sales contracts are nearing the end of time limits set by the Federal Statute of Limitations," and "[s]ome

several reasons why the statute of limitations should not apply. Each is unconvincing.

a. The government concedes (Br. in Opp. 9), as it must, that Section 2415(a) is a "general background statute of limitations." The government asserts, however, that the FOGRMA exempts MMS royalty collection actions from Section 2415(a). That is not so.

The government insists that, in enacting the FOGRMA, Congress did not "intend[] to incorporate" Section 2415(a) "*sub silentio*." Br. in Opp. 12. That assertion turns the proper analysis on its head. Under the terms of Section 2415(a), the limitations period applies to royalty collection actions unless Congress has "otherwise provided." If Congress was silent, then Section 2415(a) remains in force.

The government cannot point to any provision in the FOGRMA that overrides or supersedes Section 2415(a). The government instead relies on the "regulations implementing" the FOGRMA, and on the agency's uncodified "practice," to "create a comprehensive structure" that silently supersedes Section 2415(a). Br. in Opp. 9, 12. But nothing in the FOGRMA mandates or even alludes to the administrative enforcement procedures that the Interior Department prefers

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proceeds paid to settle contractual obligations may be royalty bearing, * * * [r]oyalties may be lost * * * if royalty determinations are not made promptly"); United States Geological Survey, Conservation Division Manual, Release No. 57, at 3, 9 (Oct. 26, 1979) ("The statute of limitations under 28 U.S.C. is six years; therefore, a comprehensive audit shall be conducted on *all* leases within six years."), reprinted in Phillips C.A. Rec. Excerpts Tab 15; Memorandum from Frederick N. Ferguson, Assistant Solicitor, Minerals, United States Department of the Interior, to Chief, Conservation Division, United States Geological Survey (May 10, 1974), reprinted in Appendix to Brief of *Amicus Curiae* American Petroleum Institute 2a ("It is clear that the statute applies to suits by the government to collect rents and royalties").

over conventional contract actions. See Pet. 20 n.9.[3] In any event, the agency's procedural choices cannot restrict the application of the statutory limitations provision; only the express action of Congress, not the contrary preference of an agency or a court, can narrow or override Section 2415(a). See *United States* v. *Kubrick*, 444 U.S. 111, 118 (1979). And Congress said nothing in the FOGRMA that trenches on that Section.

Moreover, an examination of what Congress did say in the FOGRMA does not bolster the government's argument, but demolishes it. In fact, the drafters appear to have used the six-year limitations period in Section 2415(a) as a standard for complementary provisions of the new Act.

For example, the six-year record retention requirement in FOGRMA (30 U.S.C. § 1713(b)) is an express acknowledgement that royalty claims that are more than six years old are presumptively stale. The ability of the government to extend the document retention period in no way carries with it an ability to extend the time to subject lessees to affirmative liability. See *Phillips Petroleum Co.* v. *Lujan*, 951 F.2d 257, 259-260 (10th Cir. 1991). Audits of old records are not futile. If an audit revealed deceptive practices, the statute of limitations might be tolled under 28 U.S.C. § 2416(c). In addition, the government can offset any stale royalty claim against a later claim by the lessee for a refund of a royalty overpayment. See 28 U.S.C. § 2415(f).

The civil penalty actions authorized under the FOGRMA also must be "commenced within 6 years after the date of the act or omission which is the basis for the action." 30

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[3] Of course the government *may* determine royalty liabilities administratively in the first instance. It simply must either sue within the limitations period and ask the court to stay its hand until the administrative process is complete (see Pet. 21 n.11) or argue in a later enforcement action that an administrative payment order tolls the statute.

U.S.C. § 1755. The legislative history makes clear that the "act or omission" that begins the running of the statute is the *original* non-compliance that the MMS intends to correct by the order or notice preceding the imposition of a penalty: the limitations period "is intended to run from the date of the initial act which is the basis for the cause of action." S. Rep. No. 512, 97th Cong., 2d Sess. 19 (1982). Indeed, the Senate Report explicitly linked the civil penalty limitations period with the six-year limitation on record-keeping requirements: "In adopting a six-year statute of limitations, the Committee intends that persons subject to the record-keeping requirements of the [FOGRMA] not be burdened with the need to maintain records for more than six years." *Ibid.*

These provisions do not conflict with the limitations period in Section 2415(a) in any way, but merely complement it. Congress therefore has not "otherwise provided" a limitations period for royalty collection actions. For royalty contracts, as for other government contracts, Congress believed that a six-year limitations period sufficiently preserved the government's rights.

b. The government makes the additional, astonishing claim that an action brought to enforce a lessee's contractual obligation to pay royalties is not "founded upon" a contract at all. Br. in Opp. 14-17. Try as it might, the government cannot disguise the fact that its claim for royalties is "founded upon" its "contract" with a lessee. See 2 ROCKY MOUNTAIN MINERAL LAW FOUNDATION, LAW OF FEDERAL OIL & GAS LEASING § 21.01, at 21-2 (1994).

The Secretary's "responsibility to determine production values and collect royalties" is hardly "independent" of the mineral lease contracts to which that duty applies. Br. in Opp. 16. On the contrary, like the lessee's obligation to pay royalties, the Secretary's responsibility to monitor and collect them is non-existent without a lease. The administrative valuation process merely exercises the government's contrac-

tual right to determine the value upon which contractual royalties are paid. Both the obligation and its enforcement are "founded upon" the lease "contract."

As a substantive matter, the administrative valuation of royalties depends on the "Secretary's construction of the lease contract in the light of the applicable statute and implementing regulations." *United States* v. *Southwest Potash Corp.*, 352 F.2d 113, 116 (10th Cir. 1965), cert. denied, 383 U.S. 911 (1966).[4] That the Secretary exercises his contractual prerogatives through an administrative process does not make the lessor-lessee relationship or the royalty obligation any less contractual.[5]

That conclusion is not undercut by the unsurprising fact that most lessees "either pay the amount due or pursue[] the available administrative [and judicial review] procedures to challenge" a payment order; a lessee may waive its opportunity to contest the substance of the royalty demand unless it seeks some form of review of the MMS's administrative determination. The administrative determination of the amount, however, can lead to private *liability* only through operation of the contract. See *Katz* v. *Cisneros*, 16 F.3d 1204, 1209 (Fed. Cir. 1994) ("any monetary consequences

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[4] *Southwest Potash*, like *United States* v. *General Petroleum Corp.*, 73 F. Supp. 225, 229-230 (C.D. Cal. 1946), aff'd *sub nom. Continental Oil Co.* v. *United States*, 184 F.2d 802 (9th Cir. 1950), was a government-initiated judicial action to collect disputed royalties. See 352 F.2d at 115. See also Pet. 20 n.9. Cf. Br. in Opp. 12.

[5] See *Diamond Shamrock Exploration Co.* v. *Hodel*, 853 F.2d 1159, 1165 (5th Cir. 1989) (rejecting the Secretary's position because it did "not comport with the plain meanings of the words in the lease"); *United States* v. *Essley*, 284 F.2d 518, 520 (10th Cir. 1960); *Continental Oil Co.* v. *United States*, 184 F.2d 802, 807 (9th Cir. 1950) (the "rights of the parties are determined by the provisions of the leases, read in the light of" the relevant statutory provisions). See also *Chapman* v. *Sheridan-Wyoming Coal Co.*, 338 U.S. 621, 625-629 (1950).

will flow through the contractual scheme"). There simply is little practical reason for a lessee to require the government to sue to collect a *timely* royalty obligation once the amount has been fixed by administrative and judicial review. Only the agency's recent tardiness has forced the question.

The FOGRMA did not alter the essentially contractual nature of the duty to pay mineral royalties. Congress recognized that leases impose "a contractual obligation to pay royalties." H.R. Rep. No. 859, 97th Cong., 2d Sess. 16 (1982), reprinted in 1982 U.S.C.C.A.N. 4268, 4270. All that the FOGRMA did — and all that it purported to do — was to provide mechanisms and incentives to improve the Secretary's oversight.[6] Leases remain contracts, and actions to collect royalties remain actions founded upon those contracts — and remain limited by Section 2415(a).

c. The government also contends that the policies that underlie statutes of limitations do not apply to the MMS's ability to collect royalties of unlimited age, so long as the "validity" of the MMS's largely discretionary valuation is "upheld." Br. in Opp. 16. That argument has two flaws. First, a central policy of limitations statutes is that "the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Bowen* v. *New York*, 476 U.S. 467, 481 n. 13 (1986). Second, even if the "validity" of a claim affected the bar of limitations, the "validity" upon which the government relies stems not from any objective standard, but rather from the Secretary's wide discretion and the necessary deference of reviewing courts. For the claim to be "valid," the Secretary need not be right, even by a

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[6] Before the FOGRMA, the Interior Department used administrative proceedings to determine the value of production, audited lessees, and imposed limited civil penalties. *E.g.*, *California Co.* v. *Seaton*, 187 F. Supp. 445, 447 (D.D.C. 1960), aff'd *sub nom. California Co.* v. *Udall*, 296 F.2d 384 (D.C. Cir. 1961); H.R. Rep. No. 859, *supra*, at 16-18, 33, reprinted in 1982 U.S.C.C.A.N. 4269, 4271-4272, 4287.

preponderance of the evidence, so long as he is neither arbitrary nor capricious. The limitations period is a lessee's only protection against belated and sweeping changes in MMS valuation policy. This Court's review is necessary to preserve that safeguard.

* * * * *

This Court long ago rejected the government's attempt to limit a statute of limitations to a "particular mode of proceeding" in order to bring otherwise-limited actions "at any distance of time." *Adams* v. *Woods*, 6 U.S. (2 Cranch) 336, 340, 342 (1805) (Marshall, C.J.). The Court should grant certiorari to review this modern attempt to use administrative form to defeat congressional intent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WILLIAM G. PAUL
KENNETH E. ROGERS
Office of the General Counsel
Phillips Petroleum Company
1260 Adams Building
Bartlesville, OK 74004

ARTHUR M. (RUSS) MEYER, JR.
T.L. (TOM) CUBBAGE II
Brown McCarroll &
Oaks Hartline
300 Crescent Court
Dallas, TX 75201-6929

ANDREW L. FREY
Counsel of Record
KENNETH S. GELLER
DONALD M. FALK
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0602

Counsel for Petitioner

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